

Message

From: Landeene, Sarah [Landeene.Sarah@epa.gov]
Sent: 1/13/2021 3:44:44 PM
To: Fotouhi, David [Fotouhi.David@epa.gov]
CC: Idsal, Anne [idsal.anne@epa.gov]; Moor, Karl [Moor.Karl@epa.gov]; Harlow, David [harlow.david@epa.gov]; Raymond, Kelley [Raymond.Kelley@epa.gov]; Cory, Preston [Cory.Preston@epa.gov]; Tardif, Abigale (Abbie) [Tardif.Abigale@epa.gov]; Gustafson, Adam [Gustafson.Adam@epa.gov]; Wheeler, Kevin [Wheeler.Kevin@epa.gov]; Yarbrough, John (Daniel) [Yarbrough.Daniel@epa.gov]
Subject: RE: 1.13.20 - Agenda: OGC/OAR/OP Weekly

All,

Below are the agenda items for the check-in at 11.

01.13.20 - OGC/OAR/OP Agenda

Ex. 5 Deliberative Process (DP)

From: Fotouhi, David <Fotouhi.David@epa.gov>
Sent: Tuesday, January 12, 2021 1:56 PM
To: Landeene, Sarah <Landeene.Sarah@epa.gov>
Cc: Idsal, Anne <idsal.anne@epa.gov>; Moor, Karl <Moor.Karl@epa.gov>; Harlow, David <harlow.david@epa.gov>; Raymond, Kelley <Raymond.Kelley@epa.gov>; Cory, Preston <Cory.Preston@epa.gov>; Tardif, Abigale (Abbie) <Tardif.Abigale@epa.gov>; Gustafson, Adam <Gustafson.Adam@epa.gov>; Wheeler, Kevin <Wheeler.Kevin@epa.gov>; Yarbrough, John (Daniel) <Yarbrough.Daniel@epa.gov>
Subject: Re: 1.13.20 - Agenda: OGC/OAR/OP Weekly

Please include:

Ex. 5 Deliberative Process (DP)

Sent from my iPhone

On Jan 12, 2021, at 1:37 PM, Landeene, Sarah <Landeene.Sarah@epa.gov> wrote:

All,

Please send me any agenda items for tomorrow's check-in scheduled for 11am.

Thank you,
Sarah

Sarah Landeene
U.S. Environmental Protection Agency

Desk: 202-564-1228 | Cell: 202-816-2700

Message

From: Fugh, Justina [Fugh.Justina@epa.gov]
Sent: 1/14/2021 11:19:05 PM
To: Gustafson, Adam [Gustafson.Adam@epa.gov]
CC: Payne, James (Jim) [payne.james@epa.gov]; Griffo, Shannon [Griffo.Shannon@epa.gov]
Subject: signed impartiality determination
Attachments: Adam Gustafson impartiality determination 1-14-21 signed.pdf

Hi Adam,

Attached is the signed impartiality determination for participation in the petition for reconsideration of the 2009 greenhouse gas endangerment finding. I've dated it today but you can see that its effective date is yesterday, when I indicated to you by email that we would approve it.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Impartiality Determination to Participate in a Petition for Reconsideration of EPA's 2009 Greenhouse Gas Endangerment Finding

FROM: Justina Fugh **Justina Fugh** Digitally signed by Justina Fugh
Date: 2021.01.14 18:12:03 -05'00'
Alternate Designated Agency Ethics Official and
Director, Ethics Office

TO: Adam Gustafson
Deputy General Counsel

Prior to entering federal service on March 29, 2020, you were a partner at Boyden Gray & Associates, providing legal and lobbying services to a variety of clients. Now, as Deputy General Counsel of the United States Environmental Protection Agency (EPA), you seek to participate in a specific party matter in which one of your former clients, the Competitive Enterprise Institute (CEI), is a party. You indicate that you did not yourself work personally and substantially on that same matter. You have received a waiver from the White House Counsel's office and now seek an impartiality determination from me. Your request is granted. This memorandum confirms in writing the determination I made on January 13, 2021.

NEED FOR A PLEDGE WAIVER

Pursuant to Executive Order 13770, you signed the Ethics Pledge and are prohibited from participating in specific party matters in which your former employer or former client is a party or represents a party. Given the Agency's interest in having your participation in certain matters, the EPA sought a waiver of the provisions of Section 1, paragraph 6 of the Ethics Pledge on your behalf. This waiver, which was granted on June 17, 2020, authorized you to participate personally and substantially in specific litigation as well as other potential cases arising at EPA in which your former client, CEI, is a party, provided that you did not previously participate personally and substantially in that same matter for CEI or any other party. *See* attachment.

NEED FOR IMPARTIALITY DETERMINATION

What remains is an impartiality concern under the federal ethics rules set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, Subpart E, "Impartiality in Performing Official Duty." For one year from the date your last provided services to CEI, you have a "covered relationship" with them pursuant to 5 C.F.R. § 2635.502(b)(1)(iv). Absent an impartiality determination from me, you still cannot participate in

any specific party matter in which CEI is a party if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. *See* 5 C.F.R. § 2635.502(a).

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern over the questioning of the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). The factors that EPA takes into consideration are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Because I conclude that the interest of the United States Government in your participation outweighs any concerns about your impartiality, I am authorizing you to participate as Deputy General Counsel in specific party matters in which CEI is a party, provided that you did not participate personally and substantially in the matter previously with CEI or any other party. In making this determination to enable you to effectively carry out your duties as Deputy General Counsel and to advance the interests of the Agency, I have taken the following factors into consideration:

Nature of the relationship involved – A graduate of the University of Virginia and Yale Law School, you clerked for judges on the Ninth Circuit and the D.C. Circuit before entering private practice. Prior to becoming a partner at Boyden Gray & Associates, you were an associate at Cooper & Kirk where you specialized in appellate litigation. While at Boyden Gray & Associates, you represented States, environmental groups, biofuel producers, agricultural interests, and public policy organizations, on air quality and automotive regulations and other Clean Air Act (CAA) matters. You have argued CAA appeals in the U.S. Court of Appeals for the D.C. Circuit and testified before Congress on CAA regulations. Through this work, you have gained extensive experience in CAA regulations and litigation.

Effect of the matter upon your financial interest – You have no continuing financial interest with CEI, nor do you have any financial interest in the outcome of this petition for reconsideration.

Nature and importance of the employee's role – In addition to serving as the chief legal advisor to EPA and implementing the nation's environmental laws, the Office of General Counsel also represents the Agency in defense of agency actions. In the position of Deputy General Counsel, you must be able to provide legal counsel and vital input into the Agency's defense. Your invaluable knowledge and experience with Clean Air Act regulations and litigation are of great

importance in advocating the interests of the Agency in its consideration of this petition and in advising the Acting General Counsel and Administrator.

Sensitivity of the matter –Your participation in this specific party matter, including decisions the Agency makes at this point in this Administration, will be of importance to the Administrator and senior leadership. The case involves nationally significant air issues and Administration interests.

Difficulty of reassigning the matter to another employee – Your expertise and comprehensive understanding of CAA regulations and litigation are crucial for EPA, including for this case. The previous political Deputy General Counsel with CAA expertise started in January 2017 and departed in December 2019. You were hired because of your extensive CAA expertise which is needed to counsel and advise the EPA Administrator and senior leadership on behalf of the Agency.

Under this limited authorization, you may participate personally and substantially in the CEI petition for reconsideration of EPA's 2009 Greenhouse Gas Endangerment Finding. I determine that your expertise is needed for similar reasons as described above. Thus, this authorization permits you to participate in other specific party matters in which CEI is a party provided that you did not previously participate personally and substantially while serving as an attorney for CEI or any other party. You will be allowed to participate in these specific party matters, including meetings or communications related to such cases even if CEI is present. But you must remain recused from those specific party matters in which your former client is a party if you participated personally and substantially previously. You will otherwise fully comply with the remainder of the requirements imposed by the President's Ethics Pledge and with all applicable federal ethics laws and regulations, as well as your own attorney bar obligations.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact Justina Fugh of OGC/Ethics or me.

Attachment

cc: David Fotouhi, Acting Principal Deputy General Counsel
 Jim Payne, Designated Agency Ethics Official and Deputy General Counsel for
 Environmental Media and Regional Law Offices
 Elise Packard, Deputy General Counsel for Operations
 Kamila Lis-Coghlan, Deputy General Counsel

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

In re:)	
)	EPA Docket No.
Endangerment and Cause or Contribute)	
Findings for Greenhouse Gases Under)	EPA-HQ-OAR-2009-01
Section 202(a) of the Clean Air Act)	
)	

PETITION FOR RECONSIDERATION OF
“ENDANGERMENT AND CAUSE OR CONTRIBUTE FINDINGS FOR
GREENHOUSE GASES UNDER SECTION 202(a) OF THE CLEAN AIR ACT”

Filed by

**Concerned Household Electricity Consumers Council, consisting of
Joseph D’Aleo, Clement Dwyer, Jr., Russell C. Slanover, Scott Univer,
James P. Wallace III, Robin D. Weaver, and Douglas S. Springer**

Francis Menton
Law Office of Francis Menton
85 Broad Street, 18th floor
New York, New York 10004
(212) 627-1796
fmenton@manhattancontrarian.com

Harry W. MacDougald
Caldwell Propst & DeLoach LLP
Two Ravinia Drive, Suite 1600
Atlanta, Georgia 30346
(404) 843-1956
hmacdougald@cpdlawyers.com

Attorneys for Concerned Household
Electricity Consumers Council and
its members

TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
I. Introduction	1
II. Legal Standard.....	1
III. Standing Of The Petitioners.....	5
IV. The “Lines Of Evidence” On Which EPA Based The Endangerment Finding Have All Been Invalidated.....	8
V. Conclusion.....	13

I. INTRODUCTION

Pursuant to Section 307(d) of the Clean Air Act, 42 U.S.C. § 7607(d), the Concerned Household Electricity Consumers Council (“CHECC”), consisting of Joseph D’Aleo, Clement Dwyer, Jr., Russell C. Slanover, Scott Univer, James P. Wallace III, Robin D. Weaver and Douglas S. Springer, hereby petition the U.S. Environmental Protection Agency (“EPA” or “the Agency”) to convene a proceeding for reconsideration of the “Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act” published by the Agency on December 15, 2009 (74 F.R. 66496, Dec. 15, 2009) (original EPA Docket No. Docket EPA-HQ-OAR-2009-171) (“the Endangerment Finding”).

As is more fully shown below, the Endangerment Finding was based on attribution of observed climate change to anthropogenic activities through what EPA termed its three “lines of evidence.” 74 C.F.R. at 66518. Scientific research since the adoption of the Endangerment Finding has invalidated each of EPA’s three lines of evidence. This Petition principally relies on the peer-reviewed Research Report of Wallace, *et al.*, that was first published on September 21, 2016. *See* <https://thsresearch.files.wordpress.com/2016/09/ef-cpp-sc-2016-data-ths-paper-ex-sum-090516v2.pdf> (“Research Report”). That Research Report is based on evidence that includes data as to atmospheric temperatures subsequent to the 2009 Endangerment Finding. The invalidation of the Endangerment Finding is conclusive, and thoroughly undermines all basis for any and all EPA regulation that is based on the Endangerment Finding, and the Social Cost of Carbon estimates that are based on this Finding.

The regulations that are based on the Endangerment Finding have resulted in much ongoing activity in the economy that looks to shut down existing sources of electricity and replace them with other much more expensive sources. Much of this activity is ongoing and, if not halted promptly, will impose massive new burdens on consumers of electricity. Therefore, Petitioners ask that EPA promptly convene hearings on this subject and issue a new “Non-Endangerment Finding” no later than June 20, 2017.

II. LEGAL STANDARD

Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B), states in relevant part:

If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such an objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.

Thus, EPA is required to convene a proceeding for reconsideration upon a showing of two conditions precedent: (1) the information arose after the period for public comment on the Endangerment Finding and (2) the objection is of “central relevance to the outcome of the rule.”

The procedural and substantive requirements for a petition for reconsideration are easily met here. The matters in this Petition could not have been raised during the comment period on the Endangerment Finding because the Research Report on which this Petition principally relies was first published on September 21, 2016, close to seven years *after* the Endangerment Finding. The Research Report in turn relies on substantial scientific evidence and data that did not exist at the time of the Endangerment Finding, namely data as to atmospheric temperatures that include extensive data for time periods subsequent to the Endangerment Finding. It was therefore not only impracticable but impossible to have raised these grounds within the original comment period or the period for judicial review of the Endangerment Finding.

The Petition is also timely under the rule of *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975).¹ *Oljato Tribe* sets forth a straightforward three-step process for EPA to follow in handling petitions for reconsideration under the Clean Air Act:

- (1) The person seeking revision of a standard of performance, or any other standard reviewable under Section 307, should petition EPA to revise the standard in question. The petition should be submitted together with supporting materials, or references to supporting materials.
- (2) EPA should respond to the petition and, if it denies the petition, set

¹ The Clean Air Act’s legislative history makes clear that “the committee bill confirms the court’s decision in *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975).” See H.R. Rep. 95-294, at 323 (May 12, 1977).

forth its reasons. (3) If the petition is denied, the petitioner may seek review of the denial in this court pursuant to Section 307.

Id. at 666.

This Petition satisfies the requirements enumerated in *Oljato Tribe*. It satisfies the first step because it seeks the withdrawal of the Endangerment Finding on specified legal grounds, namely that the attribution of warming to human emissions on which the Endangerment Finding is based has been conclusively invalidated. EPA thus has a duty to respond under the second step, with any denial of the Petition subject to review in the D.C. Circuit under the third step.

Oljato Tribe, in establishing the right to seek reconsideration, does no more than recognize the reality, first emphasized in the legislative history to the 1970 Clean Air Act Amendments, that regulations may need to be revised in light of new information:

Section 307 originated in the Senate version of the Clean Air Act. The Senate committee described its purpose in allowing for subsequent review based on new information as follows:

The committee recognizes that it would not be in the public interest to measure for all time the adequacy of a promulgation of any standard or regulation by the information available at the time of such promulgation. In the area of protection of public health and environmental quality, it is clear that new information will be developed and that such information may dictate a revision or modification of any promulgated standard or regulation established under the act. The judicial review section, therefore, provides that any person may challenge any promulgated implementation plan after the date of promulgation whenever it is alleged that significant new information has become available.

S.Rep.No.91-1196, 91st Cong., 2d Sess., 41-42 (1970).

Oljato Tribe, 515 F.2d at 660. Thus, when critical new information becomes available, as here, after a “regulation” has been “promulgated,” argument should be directed to EPA in the first instance on reconsideration, to build an appropriate administrative record for later D.C. Circuit review. *See id.* 665-66.

In *Oljato Tribe*, the holding of which was expressly confirmed in the legislative history of the 1977 Clean Air Act amendments, the relevant

reconsideration petition was remanded to EPA for consideration on its merits even though it was filed long outside the review period. Where, as here, the grounds for reconsideration arise after the close of the review period, the petition must still be considered.

The D.C. Circuit explained in *Oljato Tribe* that “the public’s right to petition the Administrator for revision of a standard of performance and the Administrator’s duty to respond substantively to such requests *exist completely independently of Section 307 and this court’s appellate jurisdiction.*” 515 F.2d at 667 (emphasis added). Thus, in *PPG Indus., Inc. v. Costle*, 659 F.2d 1239, 1250 (D.C. Cir. 1981), the D.C. Circuit held that amendment or repeal of a Clean Air Act regulation could be sought under APA Section 553(e) or Section 307(d)(7)(B), even well outside the 60-day review window:

Alternatively, a petition may be filed directly with EPA to interpret or amend the standard, to withdraw the Guidelines, or to specify midnight to midnight reporting procedures. *See* 42 U.S.C. § 7607(d)(7)(B); 5 U.S.C. § 553(e). Either route would provide a reviewing court with a contemporaneous record of the agency’s consideration of this issue, rather than with the “post hoc rationalizations of counsel.” *See Oljato Chapter of the Navajo Tribe et al. v. Train*, 515 F.2d 654, 665-68 (D.C. Cir. 1975).

PPG Indus., Inc. v. Costle, 659 F.2d at 1250. This procedure has been repeatedly recognized and approved. “The court subsequently endorsed the same procedure [as in *Oljato Tribe*], also under section 307, in *Group Against Smog & Pollution, Inc. v. EPA*, 665 F.2d 1284, 1290 (D.C. Cir. 1981); and *Natural Resources Defense Council, Inc. v. Thomas*, 845 F.2d 1088 (D.C.Cir.1988).” *Ciba-Geigy Corp. v. EPA*, 46 F.3d 1208, 1210 (D.C. Cir. 1995) (agreeing with the reasoning of those cases). The Agency itself granted a three-month stay of an emissions standard promulgated nearly four years earlier. *See* 63 Fed. Reg. 24,749 (May 5, 1998).

In sum, it is well-settled that EPA has a duty to consider and grant this Petition for Reconsideration, under both Section 307 and as a petition for rulemaking under 5 U.S.C. 553(e), because the grounds presented arose after the close of the period for public comment and judicial review.²

² To be clear, this Petition seeks relief alternatively under Clean Air Act Section 307(d)(7)(B) and 5 U.S.C. § 553(e).

Where, as here, the issues on reconsideration are substantial, a summary denial of the Petition would constitute an abuse of EPA's discretion. *Id.* at 666, n. 19. Likewise, a decision that EPA lacks authority to entertain the petition at all would misread the Agency's statutory mandate. *See Prill v. NLRB*, 755 F.2d 941, 947-48 (D.C. Cir. 1985), and its progeny. EPA may and must exercise the statutory discretion it has been delegated to consider this Petition on its merits.

The matters raised in this Petition are clearly of "central relevance" to the outcome of the Endangerment Finding. Indeed, the Research Report thoroughly and conclusively invalidates the entire basis for the Endangerment Finding, as that basis is stated and defined in the Endangerment Finding itself. *See Coalition for Responsible Regulation v. EPA*, 684 F. 3d 102, 125, 126 (D.C. Cir. 2012) (defining test of "central relevance"), *reversed on other grounds sub. nom. Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427 (2014).

III. STANDING OF THE PETITIONERS

The Petitioners herein are the Concerned Household Electricity Consumers Council ("CHECC"), and its members, namely Joseph D'Aleo, Clement Dwyer, Jr., Russell C. Slanover, Scott Univer, James P. Wallace III, Robin D. Weaver, and Douglas S. Springer.

Each of CHECC's members is a citizen of the United States and a member of a household that pays a monthly electricity bill to a utility that in turn is regulated by EPA. EPA's regulations based on the Endangerment Finding – notably but not exclusively including the so-called Clean Power Plan, 40 C.F.R. at 64662, *et seq.* – seek to replace current electricity generation sources primarily based on fossil fuels like coal and natural gas with so-called "renewables," principally wind turbines and solar panels. Replacement of fossil fuel sources with such renewables, that provide power only intermittently, threatens to increase the cost of electricity paid by the Petitioners (and by all Americans) by a factor of five or likely far more. Thus, should EPA's Endangerment Finding not be reconsidered and revoked, each of the Petitioners faces electricity bills that will inevitably increase over the coming years by many thousands of dollars per year. On a nationwide basis, the unnecessary incremental cost to consumers of replacing fossil fuel-based electricity generation with intermittent renewables is likely to be in the range of hundreds of billions of dollars per year, if not more.

A critical problem with intermittent renewables like wind and solar power lies in the excess costs that must be incurred to turn power from these sources into a fully-functioning electricity system that provides reliable power 24 hours a day, 7

days a week, and 365 days a year. Unfortunately, the wind is often calm or blows lightly; and the sun goes completely dark fully half the time (“night”), and also shines at far less than full strength on winter days, cloudy days, cloudy winter days, and at dawn and dusk. At many of these times, consumer power demands are high.

When the intermittent sources provide less than 10% of the electricity in a system, the problems of intermittency typically make only a small cost difference. On a calm night, the lack of power from wind and solar sources can be covered over by a cushion of 10 – 15% or so of excess fossil fuel-based electric power generation capacity. But as the percent of electricity generation from intermittent renewables increases to 15% and beyond, the necessary additional costs multiply. That proposition is demonstrated by the experience of states and countries that have attempted to increase the percent of their electricity generated by intermittent renewables.

For example, California is a “leader” in the United States in generating power from wind and solar sources. According to the California Energy Commission, in 2015 California got 6% of its electricity supply from solar and 8.2% from wind, for a total of 14.2% from those two intermittent sources. *See* http://www.energy.ca.gov/almanac/electricity_data/total_system_power.html According to the U.S. Energy Information Agency, California’s average electricity rate that year was 15.62 cents per kWh, versus a U.S. average of 10.31 cents per kWh. *See* https://www.eia.gov/electricity/monthly/epm_table_grapher.cfm?t=epmt_5_6_a In Europe, Germany began its so-called *Energiewende* (“energy transformation”) in 2010, and by 2015 had gotten the portion of its electricity generated from wind and solar all the way up to just over 30%. *See* <http://www.eia.gov/todayinenergy/detail.php?id=26372> The result: the average German household’s electricity rate in 2015 had risen to 28.7 euro cents per kWh, about *triple* the average U.S. rate. *See* <https://www.cleanenergywire.org/factsheets/what-german-households-pay-power>

Analyses of the soaring price of electricity in Germany place the blame squarely on excess costs that have been necessarily incurred to try to get to a stable, functioning, 24/7/365 system with so much input from intermittent renewables. First, massive wind and solar capacity must be installed to try to deal with days of light wind and heavy clouds. And for calm nights when the wind and solar sources produce nothing, nearly the entire fleet of fossil fuel plants must be maintained and ready to go, even though those sources may be idle much of the time. And then, some means must be found to deal with the surges of available

electricity when the wind and sun suddenly blow and shine together at full strength at the same time. As noted by Benny Peiser at the Global Warming Policy Foundation on April 4, 2015 (<http://www.thegwpcf.com/benny-peiser-eus-green-energy-debacle-shows-the-futility-of-unilateral-climate-policies/>):

Every 10 new units worth of wind power installation has to be backed up with some eight units worth of fossil fuel generation. This is because fossil fuel plants have to power up suddenly to meet the deficiencies of intermittent renewables. In short, renewables do not provide an escape route from fossil fuel use without which they are unsustainable. . . . To avoid blackouts, the government has to subsidize uneconomic gas and coal power plants. . . . Germany's renewable energy levy, which subsidizes green energy production, rose from 14 billion euros to 20 billion euros in just one year as a result of the fierce expansion of wind and solar power projects. Since the introduction of the levy in 2000, the electricity bill of the typical German consumer has doubled.

And those extra costs are just to get to a system that gets about 30% of power from the intermittent renewables. To get higher than that, some means must be found to store the power from the wind and sun for release at times of calm and dark. To make this work, major cities like New York would require the equivalent of tens of millions of Teslas' worth of batteries, at a cost of tens or hundreds of billions of dollars.

An idea of how much extra costs must be incurred to get to a system that approaches 50% or more of electricity generation from intermittent renewables, we can look to a demonstration project that was put together in South Korea for a small community of just 97 households and 178 people. A report on the Gapa Island Project appeared on the Hankyoreh news site in July 2016 at http://english.hani.co.kr/arti/english_edition/e_national/752623.html. With average electricity usage of 142 kw, and maximum usage of 230 kw, the islanders installed wind and solar capacity of 674 kw – about *three times* maximum usage, to deal with light wind and low sun. They also bought battery capacity for about eight hours of average usage. The cost of the wind and solar capacity plus batteries was approximately \$12.5 million, or about \$125,000 per household. And with all that investment the islanders were still only able to get about 42% of their electricity from the sun and wind when averaged over a full month. They still needed the full fossil fuel backup capacity.

By applying a reasonable cost of capital to a system like that of Gapa Island, and considering additional elements of a system, like additional storage, that would

be necessary to push generation from renewables to higher levels, one can calculate that a system like the Gapa Island demonstration project for the full United States would lead to electricity costs of *at least five times* their current level, and more likely, far higher. Even then, the U.S. would be hard-pressed to achieve 50% of electricity from intermittent renewables. The Petitioners obviously have a strong personal interest in heading off such disastrous cost increases. Granting the relief sought by this Petition would prevent those cost increases from occurring.

IV. THE “LINES OF EVIDENCE” ON WHICH EPA BASED THE ENDANGERMENT FINDING HAVE ALL BEEN INVALIDATED.

EPA’s Endangerment Finding appears at 74 C.F.R., page 66,495, *et seq.* At page 66,518 EPA sets forth the three “lines of evidence” upon which it says it has attributed “observed climate change” to “anthropogenic activities,” thus providing the basis for the Finding that human GHG emissions endanger human health and welfare:

The attribution of observed climate change to anthropogenic activities is based on multiple lines of evidence. The first line of evidence arises from our basic physical understanding of the effects of changing concentrations of greenhouse gases, natural factors, and other human impacts on the climate system. The second line of evidence arises from indirect, historical estimates of past climate changes that the changes in global surface temperature over the last several decades are unusual. The third line of evidence arises from the use of computer-based climate models to simulate the likely patterns of response of the climate system to different forcing mechanisms (both natural and anthropogenic).

More information about the nature of each of the three “lines of evidence” can be gleaned from EPA’s further elaboration in the Endangerment Finding itself and the associated Technical Support Document.

By the first “line of evidence,” (“our basic physical understanding of the effects of changing concentrations of greenhouse gases, natural factors, and other human impacts on the climate system”), EPA is referring to its “greenhouse gas fingerprint” or “tropical hot spot” (“Hot Spot”) theory, which is that in the tropics, the upper troposphere is warming faster than the lower troposphere and the lower is warming faster than the surface, all due to rising atmospheric greenhouse gas concentrations blocking heat transfer into outer space. By this mechanism,

increasing greenhouse gas concentration is assumed to increase surface temperatures.

The second “line of evidence” (“indirect, historical estimates of past climate changes that suggest that the changes in global surface temperature over the last several decades are unusual”) refers to EPA’s claim that global average surface temperatures have been rising in a dangerous fashion over the last fifty years.

The third “line of evidence” (“use of computer-based climate models to simulate the likely patterns of response of the climate system to different forcing mechanisms (both natural and anthropogenic)”) consists of EPA’s reliance on climate models (not actually “evidence”) that assume that greenhouse gases are a key determinant of climate change. EPA uses climate models for two purposes: to “attribute” warming to human GHG emissions, and to set regulatory policy for such emissions based on their modeled impact on global temperatures.

The Research Report of Wallace, et al. (September 21, 2016) undertook to assess each of EPA’s three “lines of evidence” and to either validate or invalidate each of them based on the best available historical temperature data. In accordance with the scientific method, the Research Report used the best available temperature data from multiple sources, all of them completely independent from each other, for the validation/invalidation exercise. The data used in the Research Report are available at the following url: <https://thsresearch.files.wordpress.com/2017/01/ef-cpp-sc-2016-data-ths-data-master-original.xlsx>. Equally available from the text of the Report itself are all the methods, equations and formulas that were used to produce its results. In other words, the Report is fully replicable by any scientist who wishes to check or question its methods or results.

The principal conclusions of the Research Report are as follows:

- “These analysis results would appear to leave very, very little doubt but that EPA’s claim of a Tropical Hot Spot (THS), caused by rising atmospheric CO2 levels, simply does not exist in the real world.”
- Once EPA’s THS assumption is invalidated, it is obvious why the climate models they claim can be relied upon, are also invalid.
- “[T]his analysis failed to find that the steadily rising Atmospheric CO2 Concentrations have had a statistically significant impact on any of the 13 critically important temperature time series data analyzed.”

- “[T]hese results clearly demonstrate - 13 times in fact - that once just the ENSO [El Nino/La Nina] impacts on temperature data are accounted for, there is no “record setting” warming to be concerned about. In fact, there is no ENSO-Adjusted Warming at all.”

Research Report, p. 4.

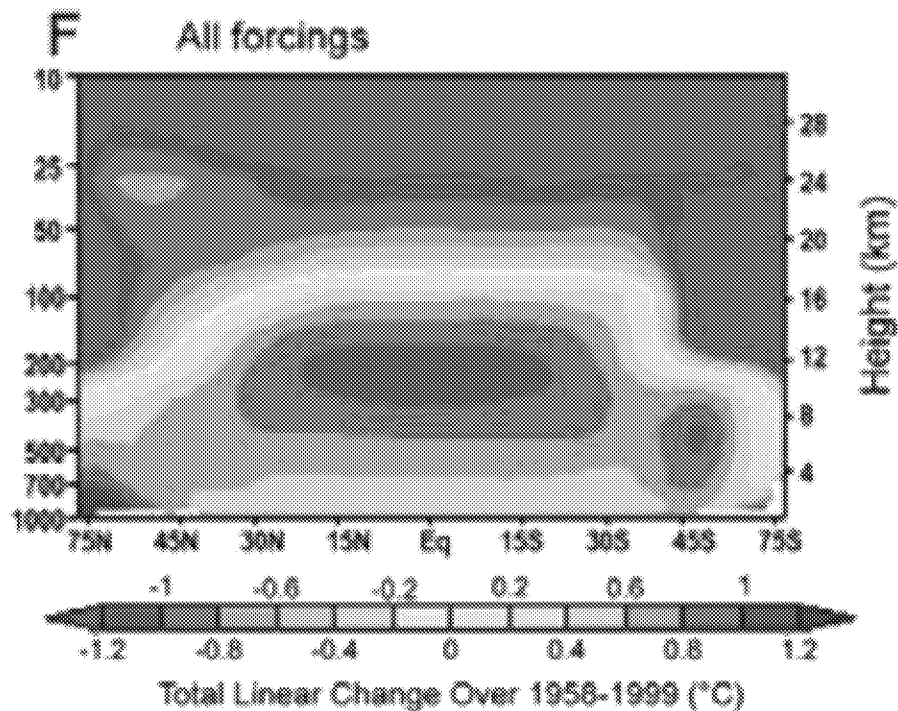
This means that the climate sensitivity parameter’s estimate is not statistically significant. Therefore, the Social Cost of Carbon estimates now in widespread use to justify regulation of CO2 emissions are fundamentally flawed. The actual Social Cost of Carbon is negative rather than positive, meaning that CO2 is in fact a beneficial gas.

Invalidation of the the Hot Spot requires reconsideration of the Endangerment Finding because the Hot Spot is a critical and necessary component of the “physical understanding” of climate that EPA claims as the foundational line of evidence supporting the Endangerment Finding. For example, the “physical understanding” of the atmospheric greenhouse mechanism set forth in U.S. Climate Change Science Program, Synthesis and Assessment Product 1.1, Temperature Trends in the Lower Atmosphere - Understanding and Reconciling Differences, (“SAP 1.1”), Chapter 1, § 1.1, The Thermal Structure of the Atmosphere, p. 17-19, https://www.gfdl.noaa.gov/bibliography/related_files/vr0603.pdf : explicitly relies upon the Hot Spot:

The presence of such greenhouse gases (e.g., carbon dioxide, methane, nitrous oxide, halocarbons) increases the radiative heating of the surface and troposphere. As specific humidity is strongly related to temperature, it is expected to rise with surface warming (IPCC, 1990), The increased moisture content of the atmosphere amplifies the initial radiative heating due to the greenhouse gas increases (Manabe and Wetherald, 1967; Ramanathan, 1981). The re-establishment of a new thermal equilibrium in the climate system involves the communication of the added heat input to the troposphere and surface, leading to surface warming (Goody and Yung, 1989; IPCC, 1990; Lindzen and Emanuel, 2002). From the preceding discussions, the lapse rate can be expected to decrease with the resultant increase in humidity, and also to depend on the resultant changes in atmospheric circulation. **In general, the lapse rate can be expected to decrease with warming such that temperature changes aloft exceed those at the surface.** As a consequence, the characteristic

infrared emission level of the planet is shifted to a higher altitude in the atmosphere.

(Emphasis added). The CCSP SAP 1.1 report depicted the Hot Spot graphically in figure 1.3, p. 25, as follows:



Similarly, the IPCC's Fourth Assessment Report (AR4) also states unequivocally that the Hot Spot is an integral feature of the "physical understanding" of the climate's hypothesized greenhouse warming mechanism. This is demonstrated by AR4 WG1, The Physical Science Basis, Chapter 9, Figure 9.1. Panel (c) shows the modeled effect of GHGs, and clearly depicts the hot spot:

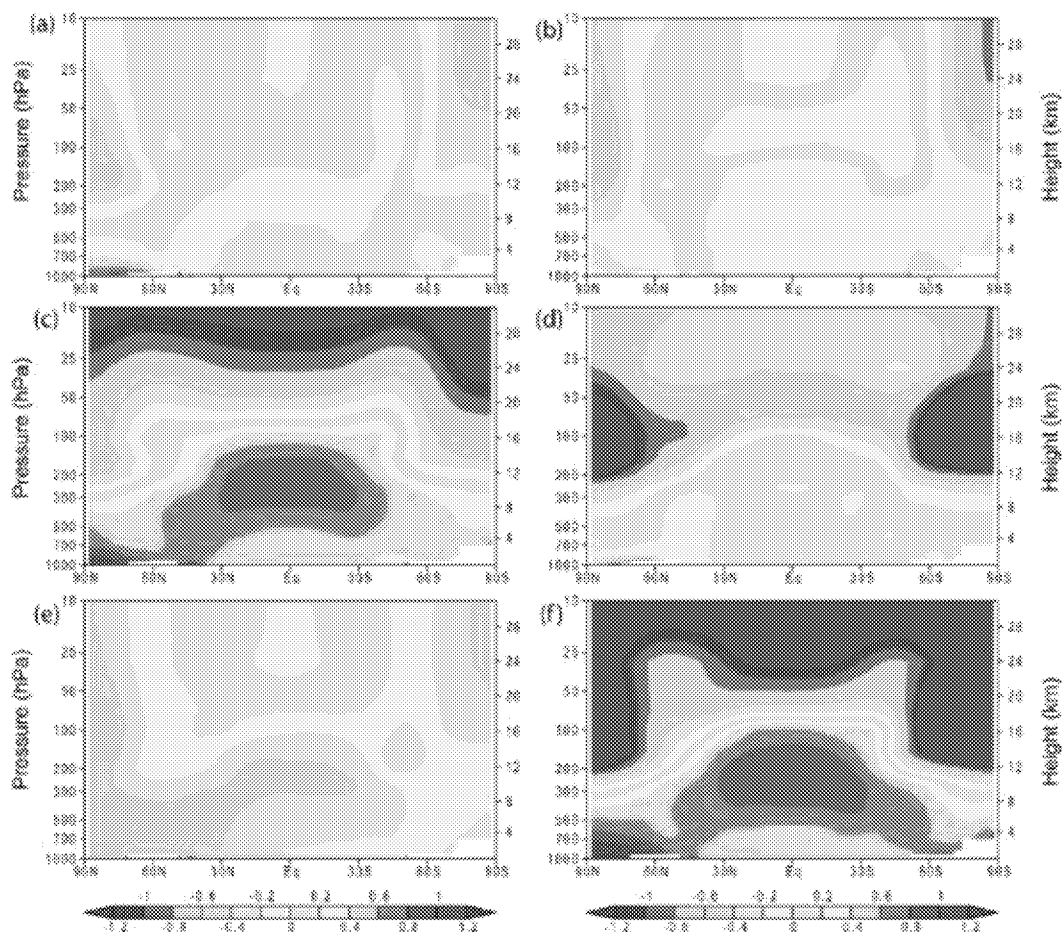


Figure 9.1 Zonal mean atmospheric temperature change from 1890 to 1999 ($^{\circ}\text{C}$ per century) as simulated by the PCM model from (a) solar forcing, (b) volcanoes, (c) well-mixed greenhouse gases, (d) tropospheric and stratospheric ozone changes, (e) direct sulphate aerosol forcing and (f) the sum of all forcings. Plot is from 1,000 hPa to 10 hPa (shown on left scale) and from 0 km to 30 km (shown on right). See Appendix 9.C for additional information. Based on Santer et al. (2003a).

The text accompanying this figure explains that “The major features shown in Figure 9.1 are robust to using different climate models.” IPCC AR4 WG1 § 9.2.2. (http://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch9s9-2-2.html).

“Greenhouse gas forcing is expected to produce warming in the troposphere,”
Id.

In adopting the Endangerment Finding, EPA explicitly, repeatedly and irrevocably placed primary reliance on the US CCSP reports and the IPCC AR4. See TSD Box 1.1, p 4. These assessments are cited thousands of times in the full set of documentation for the Endangerment Finding.

The CCSP report cited above said if the Hot Spot were missing it would be a “*potentially serious inconsistency.*” SAP 1.1, p. 11. (Emphasis added). Yet the

CCSP ultimately sided with those claiming at the time that the mismatch between observations and prediction was not fatal. *Id.*

EPA also acknowledged in the Technical Support Document for the Endangerment Finding that if the Hot Spot were missing it would be “an important inconsistency.” TSD p. 50. EPA’s team, including Tom Karl, agreed with the CCSP (led by the same Tom Karl) and concluded there was no dispositive conflict between prediction and observation. *Id.*

The Research Report, using substantial scientific evidence and additional data available only after 2009, not only shows a “an important inconsistency,” it invalidates the Hot Spot entirely. This is fatal to the EPA’s claimed physical understanding of climate, and is likewise fatal to the climate models constituting EPA’s third line of evidence. These models, relying on an invalidated physical theory, all predict the Hot Spot. Proper analysis of more than 50 years of balloon and 37 years of satellite temperature data generated by five independent entities conclusively shows that the Hot Spot does not exist. This demonstrates that the models are invalid and unreliable, and cannot properly be used for attribution analysis or forecasting warming due to anthropogenic CO2 emissions.

In sum, all three of the lines of evidence relied upon by EPA to attribute warming to human GHG emissions are invalid. The Endangerment Finding itself is therefore invalid and should be reconsidered. Moreover, this reconsideration is particularly urgent at this point in time in that the widely used Social Cost of Carbon has now been demonstrated to be fundamentally flawed. To put it mildly, the current Endangerment Finding and Social Cost of Carbon are leading the nation in the wrong direction from an energy policy standpoint. Decarbonization makes absolutely no scientific or economic sense.

V. CONCLUSION

No scientists have yet devised an empirically validated theory proving that higher atmospheric CO2 levels will lead to higher global average surface temperatures. Moreover, if the causal link between higher atmospheric CO2 concentrations and higher temperatures is broken by invalidating each of EPA’s three lines of evidence, then EPA’s assertions that higher CO2 concentrations also cause sea-level increases and more frequent and severe storms, floods, and droughts and other deleterious effects on human health and welfare are also disproved. Such causality assertions require a validated theory that higher atmospheric CO2 concentrations cause increases in temperatures. Lacking such a validated theory, EPA’s conclusions cannot stand. In science, credible empirical

data always trump proposed theories, even if those theories are claimed to (or actually do) represent the current consensus, or, in this case, a finding made by EPA.

The invalidated Endangerment Finding, combined with a fundamentally flawed and dangerous Social Cost of Carbon estimate, are now driving numerous potentially crippling regulations, including the Clean Power Plan and the newly proposed automotive fuel economy standards. EPA should therefore promptly convene a proceeding to reconsider the Endangerment Finding.

Respectfully submitted this 20th day of January, 2017.

Attorneys for Petitioners,

Francis Menton

Francis Menton by Harry W. MacDougald
Law Office of Francis Menton *express*
85 Broad Street, 18th floor *remission*
New York, New York 10004
(212) 627-1796
fmenton@manhattancontrarian.com

Harry W. MacDougald
Harry W. MacDougald
Caldwell Propst & DeLoach LLP
Two Ravinia Drive, Suite 1600
Atlanta, Georgia 30346
(404) 843-1956
hmacdougald@cpdlawyers.com



**BEFORE THE ADMINISTRATOR OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**Liberty Packing Company LLC,
Nuckles Oil Co., Inc. dba Merit Oil Company,
Norman R. "Skip" Brown,
Dalton Trucking Company, Inc.,
Loggers Association of Northern California,
Construction Industry Air Quality Coalition, and
Robinson Industries, Inc.**

PETITIONERS

**PETITION TO RECONSIDER *ENDANGERMENT AND CAUSE*
OR CONTRIBUTE FINDINGS FOR GREENHOUSE GASES
UNDER SECTION 202(a) OF THE CLEAN AIR ACT, 74 FED. REG. 66,496
(DEC. 15. 2009) DOCKET NO. EPA-HQ-OAR-2009-0171; FRL-9091-8;
*RIN 2060-ZA14 ("ENDANGERMENT FINDING")***

INTRODUCTION

Pursuant to the Right to Petition Government Clause of the First Amendment of the United States Constitution,¹ the Administrative Procedure Act,² the Clean Air Act,³ and the United States Environmental Protection Agency's ("EPA's") implementing regulations, Petitioners file this petition with EPA's Administrator and, for the reasons set forth herein, respectfully request the Administrator to reconsider EPA's Endangerment Finding, 74 Fed. Reg. 66,496 (Dec. 15, 2009), made pursuant to Section 202(a) of the Clean Air Act.

INTEREST OF PETITIONERS

Petitioner Liberty Packing Company LLC ("Liberty") is a bulk processor of tomato products. Located in California, Liberty relies on natural gas boilers for production of its tomato products. Burning natural gas creates carbon dioxide as a byproduct. Carbon dioxide is a greenhouse gas that is subject to the Endangerment Finding.

Petitioner Nuckles Oil Co., Inc. dba Merit Oil Company ("Merit Oil") is a family business that has operated in California for three generations. Merit Oil stores, transports, and wholesales a variety of petroleum products, including gasoline, diesel fuels, solvents, and kerosene, and

¹ "Congress shall make no law . . . abridging . . . the right of the people . . . to petition Government for a redress of grievances." U.S. Const. amend. I. The right to petition for redress of grievances is among the most precious of liberties safeguarded by the Bill of Rights. *United Mine Workers of America, Dist. 12 v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). It shares the "preferred place" accorded in our system of government to the First Amendment freedoms and has a sanctity and sanction not permitting dubious intrusions. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). "Any attempt to restrict those First Amendment liberties must be justified by clear public interest, threatened not doubtful or remotely, but by clear and present danger." *Id.* The Supreme Court has recognized that the right to petition is logically implicit in, and fundamental to, the very idea of a republican form of government. *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 552 (1875).

² 5 U.S.C. Section 553(e).

³ 42 U.S.C. Section 7401, *et seq.* (sometimes referred to here as the "CAA").

operates a number of delivery trucks. Merit Oil's operations emit greenhouse gases subject to the Endangerment Finding.

Petitioner Norman R. "Skip" Brown is an individual residing in California who has been the owner of a family roadbuilding business, Delta Construction Company, which will be required to go out of business in part because of regulations governing carbon dioxide emissions, which are the subjects of the Endangerment Finding.

Petitioner Dalton Trucking Company, Inc. is a California corporation that provides specialized transportation and off-loading services in connection with which it operates numerous heavy-duty trucks that emit greenhouse gases, which are the subjects of the Endangerment Finding.

Petitioner Loggers Association of Northern California ("LANC") is a nonprofit California trade association representing the interests of its members involved in the logging industry in Northern California.

Petitioner Construction Industry Air Quality Coalition ("CIAQC") is a nonprofit California trade association representing the interests of other California nonprofit trade associations and their members whose air emissions are regulated by California state, regional, and local regulations, as well as federal regulations.

Petitioner Robinson Enterprises, Inc. ("Robinson") is a third-generation family-owned California corporation engaged in harvesting and transportation of forest products, petroleum products, and transportation of various commodities. It has suffered unnecessary financial hardship as a result of various burdensome regulatory requirements.

EXECUTIVE SUMMARY

EPA's Greenhouse Gas Endangerment Finding is the cornerstone of EPA's effort to regulate greenhouse gases under the Clean Air Act. Carbon dioxide is the most prevalent

greenhouse gas. Because carbon dioxide is everywhere and in everything, the Endangerment Finding provides EPA with a springboard for regulating virtually every aspect of our nation's economic life. At the same time, it is the product of serious legal, scientific, evidentiary, and procedural errors. Those errors reflect the past Administration's rush to judgment, which was spurred by political expediency.

This Petition focuses on a glaring statutory violation, namely, EPA made the Endangerment Finding without seeking peer review from the Science Advisory Board, a blue-ribbon panel of experts established by Congress to ensure that EPA regulations are based on accurate data and credible scientific analyses. In enacting the peer review requirement, Congress was concerned that EPA not impose unnecessary restrictions on economic and personal freedom by unintelligently pursuing its regulatory goals. By ignoring the peer review requirement, EPA violated 42 U.S.C. § 4365(c)(1). That fundamental error stemmed from a desire to impress the community of nations by being among the first to regulate greenhouse gas emissions timed to coincide with the 2009 Copenhagen international climate conference.

In making the Endangerment Finding, EPA made no showing that the finding or any of its related greenhouse gas rules will remove any dangers to human health or welfare. Indeed, EPA disclaimed any obligation to define its ultimate regulatory objectives or its chosen means of achieving them and even refused to articulate how the Endangerment Finding could lead to successfully combating the climate change problems that EPA postulated. Furthermore, EPA claimed it was 90-99% certain that human-caused climate change threatened public health and welfare, *see* 74 Fed. Reg. at 66,518 & n.22, while failing to state what constitutes a safe climate, acceptable global temperature ranges, how levels of greenhouse gases in the atmosphere (whether natural or man-made) may affect those ranges, or even whether its regulatory actions would

ameliorate any risk. Because of these substantial gaps in its analysis, no one could accurately judge whether EPA achieved any discernable public benefit or congressionally authorized goal when it made the Endangerment Finding. As set forth in the attached declaration by a long-standing member of the Science Advisory Board, these analytical gaps would have been identified and communicated by the Board to EPA had EPA submitted the Endangerment Finding for statutorily-mandated peer review.

Moreover, Section 202(a)(1) of the Clean Air Act, under which the Endangerment Finding was made, requires the Administrator to exercise independent judgment to determine how a regulatory response to a perceived risk will reduce or eliminate that risk. The prior Administration left the gathering, sifting, and analyzing of the evidence, as well as the risk assessment, almost entirely to international non-governmental organizations, which have no authority under the Clean Air Act. The conclusions borrowed from those organizations rest primarily on theoretical computer modeling projections, which themselves are based on untested assumptions. Indeed, EPA acknowledged that the assumptions upon which it relied are subject to substantial uncertainty. Accordingly, the Agency's professed high confidence in its Endangerment Finding is unsupported, and its almost complete reliance on the work of non-governmental organizations was, put plainly, an abdication of its responsibilities under the Clean Air Act. As set forth in the attached expert declaration, these problems also would have been addressed by the Science Advisory Board had EPA submitted the proposed Endangerment Finding to the Board, as required by law.

The adverse economic impacts of the Endangerment Finding and the cascade of greenhouse gas regulations that it continues to generate are well documented. Virtually all sectors of the nation's economy are affected, including but not limited to mining, manufacturing, transportation, construction, and agriculture, as well as energy production, transmission, and use,

resulting in lost jobs affecting millions of American workers and their families.

Now, the new EPA Administration has the opportunity to correct the illegal process that culminated in the Endangerment Finding. Indeed, EPA has both the authority and the responsibility to reconsider the Endangerment Finding in light of the previous Administration's errors. Foremost among those errors is EPA's utter failure to submit the relevant documentation to the Science Advisory Board for peer review. It matters not that a court has reviewed the Endangerment Finding, because EPA is fully empowered to reconsider the finding at any time, as long as it articulates sufficient reasons for so doing. This Petition provides a surfeit of such reasons.

As set forth in more detail below, the Endangerment Finding should be reconsidered, and the Administrator should reopen the regulatory process so that the Science Advisory Board may be given the opportunity to conduct peer review, as required by 42 U.S.C. § 4365(c)(1).

STATEMENT OF LAW

Congress directed the EPA Administrator to establish the Science Advisory Board (sometimes referred to here as "SAB" or the "Board") to function as a peer review panel of experts to ensure that EPA's actions are scientifically and technically sound and defensible, 42 U.S.C. § 4365(a). The operative language of the SAB statute provides that EPA "shall" make its regulatory proposals available to the Science Advisory Board for peer review. 42 U.S.C. § 4365(c)(1). The SAB submittal requirement applies to all regulatory proposals made by EPA under the statutes it administers, including the Clean Air Act, and the submittal requirement is nondiscretionary. *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1188 (D.C. Cir. 1981) ("*APF*") ("The language of the statute indicates that making a [regulatory proposal] available to the SAB for comment is mandatory."). Upon receipt of the material, the SAB may provide "advice and comments on the

adequacy of the scientific and technical basis of the proposed criteria document, standard, limitation, or regulation, together with any pertinent information in the Board's possession." 42 U.S.C. § 4365(c)(2).

The plain meaning of the mandatory SAB submittal requirement is confirmed by its purpose, which is to provide the Science Advisory Board an opportunity to make available "its advice and comments [to EPA] on the adequacy of the scientific and technical basis of the [regulatory proposals]." 42 U.S.C. § 4365(c)(2). SAB's mission is to provide "expert and independent advice to the [EPA] on the scientific and technical issues facing the Agency" and to assist EPA "in identifying emerging environmental problems." 40 C.F.R. § 1.25(c). *See* Joe G. Conley, *Conflict of Interest and the EPA's Science Advisory Board*, 86 Tex. L. Rev. 165, 168 (2007) ("Congress established the EPA's Science Advisory Board in 1978 to provide independent scientific and technical advice to the EPA."). A key element of the SAB's mission is to render advice to EPA "on a wide range of environmental issues and the integrity of the EPA's research." *Meyerhoff v. United States EPA*, 958 F.2d 1498, 1499 (9th Cir. 1992).

Because the SAB submittal requirement is nondiscretionary, an EPA regulatory action subject to the submittal requirement that has not been submitted to the Board for peer review is "not in accordance with law." *See* 5 U.S.C. § 706(2)(A); *API*, 665 F.2d at 1184. *See also, e.g., Sprint Corp. v. Fed. Comm'n Comm'n*, 315 F.3d 369 (D.C. Cir. 2003); *Sugar Cane Growers Co-op of Florida v. Veneman*, 289 F.3d 89 (D.C. Cir. 2002); *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976).

STATEMENT OF FACTS

The prior EPA Administration commenced its activities in 2009 with a firm conviction that human greenhouse gas emissions are causing significant and harmful global climate change. In

one of her first official acts, then-EPA Administrator Lisa Jackson issued a memorandum to all EPA staff announcing the top five priorities that would receive her “personal attention.” The first of those priorities was “[r]educing greenhouse gas emissions.” *See Memorandum from Lisa P. Jackson to “All EPA Employees,”* dated January 23, 2009, reproduced as **Exhibit A**.

Just three months later, EPA released the proposed Endangerment Finding, which was based upon two premises. First, EPA stated that air emissions of six substances — CO₂, CH₄, N₂O, HFCs, PFCs, and SF₆ — endanger public health and welfare. Second, EPA asserted that those six substances together constitute a single “air pollutant” emitted by new automobiles that contributes to harmful “air pollution,” even though automobiles actually do not emit two of the six (PFCs and SF₆) and emit two others (CH₄ and N₂O) only in minute amounts. In fact, carbon dioxide (CO₂), a ubiquitous natural substance essential to life on Earth, was the primary target of the Endangerment Finding. *See* 74 Fed. Reg. 18,886-88 (Apr. 24, 2009). EPA provided only a 60-day comment period for the proposed Endangerment Finding, even though it was apparent the finding would create one of the most far-reaching regulatory programs in history, spurring numerous requests to extend the comment period, all of which EPA denied. *See* 74 Fed. Reg. at 66,503. Notably, the SAB submittal requirement was raised during the public comment period on the proposed Endangerment Finding, but ignored by EPA. *See Coalition Comments on EPA’s Proposed Finding of Endangerment from Anthropogenic Greenhouse Gases to Public Health and Welfare*, reproduced in relevant part in **Exhibit B**, p.10 n 4. (“EPA also failed to make available to the Science Advisory Board for review and comment the Endangerment Finding”).

On May 19, 2009, less than one month after publishing the proposed rule and well before the comment period closed, the Obama Administration announced that, “for the first time in history,” the United States “set in motion a new national policy aimed at both increasing fuel

economy and reducing greenhouse gas pollution from all new cars and trucks.” This “groundbreaking policy” was based on an “unprecedented collaboration” among federal agencies, automakers, environmental advocacy groups, organized labor, and the State of California to issue motor vehicle greenhouse gas regulations. *See President Obama Announces National Fuel Efficiency Policy*, reproduced as **Exhibit C**. EPA knew and understood that such an arrangement could not be implemented unless EPA were to promulgate the Endangerment Finding in the form in which it was proposed, and which would function as the springboard for the implementation of the “groundbreaking policy.” *See Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Fuel Economy Standards*, 74 Fed. Reg. 49454, 49464 (Sept. 28, 2009) (“If EPA makes the . . . endangerment finding . . . then section 202 authorizes EPA to issue [greenhouse gas] standards applicable to [cars and trucks].”).

EPA announced its final Endangerment Finding on December 7, 2009. *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009), just nine months after the publication of the proposed finding. Conveniently, that was the opening day of a highly publicized international conference on climate change held in Copenhagen, Denmark, attended by EPA’s Administrator. *See Copenhagen Climate Change Conference – December 2009, United Nations Framework Convention on Climate Change*, http://unfccc.int/meetings/cop_15/items/5257.php. EPA’s final rule was substantially unchanged from EPA’s proposal. 74 Fed. Reg. at 66,497-99, 66,516-17, 66,540-41.

This irregular and illegal process had consequences. In EPA’s own words, the Endangerment Finding causes “costs to sources and administrative burdens to permitting authorities . . . so severe that they [create] ‘absurd results.’” 75 Fed. Reg. at 31,516-17. EPA also stated that whether the Endangerment Finding, or any foreseeable regulatory actions based on the finding, might or even could mitigate any projected climate effects was irrelevant. 74 Fed. Reg.

at 66,507-08.

Importantly, EPA acknowledged in a prior technical document published in connection with its Advance Notice of Proposed Rulemaking for light duty vehicles (the “Car Rule”) that greenhouse gas emissions applicable to such vehicles would produce a reduction of, at most, approximately 0.01 degree Celsius in mean global temperature. *See Light Vehicle Technical Support Document*, Docket U.S. EPA-HQ-OAR-2008-0318-0084. When asked about this statement during the comment period on the Endangerment Finding, EPA declined to reevaluate its technical conclusion regarding temperature but simply “disagree[d]” that temperature effects were relevant to the Endangerment Finding, even though the Car Rule was the immediate impetus for the Endangerment Finding. *See EPA’s Response to Public Comments: Volume 10: Cause or Contribute Finding, Response to Comment 10-14*, reproduced as **Exhibit D** at 11-13.

EPA made the Endangerment Finding without benefit of input from the Science Advisory Board. Instead, EPA relied almost exclusively on “assessment literature” generated by third parties that had summarized their own views of global climate change science. According to EPA, the Administrator “relied heavily” on the assessments of the United States Global Change Research Program (“USGCRP”), the Intergovernmental Panel on Climate Change, (“IPCC,”) and the National Research Council (“NRC”) as the “*primary* scientific and technical basis of her endangerment decision.” 74 Fed. Reg. at 66,510 (emphasis added). In response to comments calling on EPA to make “its own assessment of all of the underlying studies and information,” EPA refused, on the ground that it “ha[d] no reason to believe” the reports of the three non-governmental organizations were inaccurate. *Id.* at 66,511.

Significantly, the prior EPA Administrator was apparently comfortable relying substantially on the work of *one* of the non-governmental groups, IPCC, to answer what is perhaps

the most critical issue in regulating greenhouse gas emissions — the extent to which climate change arises from anthropogenic greenhouse gas emissions, as opposed to natural forces. *See Principles Governing IPCC Work at ¶ 1-9*, reproduced as **Exhibit E** (discussing the purposes, missions, and goals of the IPCC). In so doing, EPA acknowledged that, despite republishing and relying on IPCC’s claim of 90-99% certainty, there are “varying degrees of uncertainty across many of these scientific issues.” *See* 74 Fed. Reg. 66,506.

Notwithstanding these uncertainties, EPA issued the Endangerment Finding based on computer model predictions of man-made, severe climate change impacts, and concluded that, because of its Endangerment Finding, it was legally obligated to promulgate a separate rule to restrict greenhouse gas emissions from certain new motor vehicles. Car Rule, 75 Fed. Reg. 25,324, 35,398 (May 7, 2010).

EPA further concluded that its regulation of motor vehicle greenhouse gas emissions automatically triggered, beginning on January 2, 2011, regulation of stationary-source greenhouse gas emissions under the Clean Air Act’s Prevention of Significant Deterioration (“PSD”) program and Title V programs. *See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514, 31,519-22 (Jun. 3, 2010) (rule rewriting, or “tailoring,” the Clean Air Act’s emissions thresholds for stationary sources of greenhouse gases subject to the PSD and Title V programs; *see also Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (EPA rule reversing long-standing interpretation of Clean Air Act’s applicability provisions to account for new greenhouse gas regulations).

EPA also found that its new statutory construction of the Clean Air Act would create “absurd results” never intended by Congress. *See* 75 Fed. Reg. at 31,516. To avoid those expected

absurd consequences, EPA elected to rewrite the statutory thresholds by creating new thresholds, not authorized by the Clean Air Act, unique to greenhouse gases. *Id.*

In short, the Endangerment Finding immediately triggered a flood of regulations governing emissions of greenhouse gases from numerous stationary and mobile sources.

Soon after the Endangerment Finding was made, affected parties filed petitions for review in the D.C. Circuit; *Coalition for Responsible Regulation v. EPA* (Case No. 09-1322). Several petitioners also filed administrative petitions for reconsideration with EPA. *See Reconsideration Denial*, 75 Fed. Reg. 49,556, 49,557 (Aug. 13, 2010). Some of the administrative petitions urged EPA to reconsider its Endangerment Rule in light of the extensive electronic files from the University of East Anglia's Climate Research Unit released to the public after the comment period closed. *See, e.g.*, 74 Fed. Reg. at 18886-18910 (April 24, 2009); *see also Addendum and Supplementation of Record to Coalition Comments*, dated December 4, 2009, reproduced as **Exhibit F**. Those documents raised important questions regarding the impartiality and data quality of the climate science on which the IPCC and thus EPA relied. Refusing to receive any public comment on the administrative petitions for reconsideration, EPA denied them all. *See* 75 Fed. Reg. at 49,556.

Some of the issues arising out of the massive Endangerment Finding litigation in the D.C. Circuit and related lawsuits are still being contested. One of the most recent lawsuits arises from EPA's promulgation of the Clean Power Plan, *State of West Virginia v. EPA*, (D.C. Circuit Case No. 15-1363), where EPA defended that lawsuit in part because of its Endangerment Finding. The Clean Power Plan has since been stayed by the United States Supreme Court. *See West Virginia v. EPA*, 136 S. Ct. 1000 (Mem.), 194 L.Ed.2d 17 (2016). In a recent executive order issued by President Trump, the EPA has been instructed to reconsider the Clean Power Plan, which deals

with existing fossil fuel electric generation facilities, and certain associated regulations dealing with new facilities. *See Executive Order on Clean Power Plan*: <https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economy-1>.

Because the ubiquitous natural substance carbon dioxide is one of the six greenhouse gases subject to EPA's 2009 Endangerment Finding, the effects of the finding are affecting and will continue to affect virtually all parts of the nation's economy, giving EPA potentially unprecedented power to regulate life in the United States. It is uncontroverted that EPA did not submit the Endangerment Finding to the Science Advisory Board for peer review. *See EPA's Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, Volume 3: Process Issues Raised by Petitioners*, pp 17-18, Response to Comment 3-7, reproduced as **Exhibit G**.

ARGUMENT

THE ENDANGERMENT FINDING SHOULD BE RECONSIDERED BECAUSE EPA VIOLATED A STATUTORY MANDATE WHEN IT FAILED TO SUBMIT THE FINDING TO THE SCIENCE ADVISORY BOARD FOR PEER REVIEW

I. The Text and Legislative History of the SAB Statute Required EPA to Submit the Endangerment Finding to the Science Advisory Board for Peer Review

In relevant part, the SAB statute provides that

“[for] *any* proposed criteria document, standard, limitation, or regulation provided to *any* other Federal agency for formal review and comment” [the Administrator] “*shall* make available to the Board such proposed criteria document, standard, limitation, or regulation, together with relevant scientific and technical information in the possession of the Environmental Protection Agency on which the proposed action is based.”

42 U.S.C. § 4365(c)(1) (emphasis added). The duty to submit proposed rules and regulations to the SAB is a mandatory requirement. *See API*, 665 F. 2d at 1188 (“The language of the statute

indicates that making a [regulatory proposal] available to the SAB for comment is mandatory.”).

In an analogous context, the United States Supreme Court determined that Congress’s use of the word “shall” in the Clean Water Act imposed a mandatory and discretionless obligation. *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007) (citing *Lopez v. Davis*, 531 U.S. 230, 241 (2001)). In *Lopez*, the Supreme Court noted the significance of the fact that Congress, in the same statute, used “may” and “shall” to denote different obligations, such that “may” creates discretionary obligations, while “shall” creates discretionless obligations.

The same is true in the SAB statute. 42 U.S.C. § 4365(c)(1) mandates that the Administrator “shall” submit the material to SAB for review, but then in the very next paragraph, 42 U.S.C. § 4365(c)(2) provides that the SAB “may” provide advice and comments on the material submitted to it. Accordingly, the mandatory nature of EPA’s submittal duty is clear. *See Lopez*, 531 U.S. at 241. *See also Moskal v. United States*, 498 U.S. 103, 109 (1990) (courts must give effect to every clause and word of a statute); *Bennett v. Spear*, 520 U.S. 154, 172 (1997) (describing the “rudimentary” principle of administrative law that regulatory action must comply with statutory requirements). *Chevron v. NRDC*, 467 U.S. 837, 843 (1984) (courts and agencies “must give effect to the unambiguously expressed intent of Congress”).

The legislative history of the SAB submittal requirement further illustrates Congress’s intent. *See Joint Explanatory Statement*, H.R. Conf. Rep. 96-722, 3296 (1977) (“The first paragraph of this section *requires* the Administrator of EPA to make available to the [Science Advisory] Board any proposed criteria document, standard, limitation, or regulation together with scientific background information in the possession of the Agency on which the proposed action is based.”) (emphasis added). Accordingly, an interpretation that the submittal requirement is discretionary runs afoul of Congressional intent. *See Chevron*, 467 U.S. at 845 (agency

interpretation of a statute is impermissible if it “is not one that Congress would have sanctioned.”).

A. The Endangerment Finding Is a “Regulation”

Among other regulatory actions, proposed EPA “regulations” must be submitted to the Science Advisory Board for peer review. 42 U.S.C. § 4365(c)(2); *see API*, 665 F.2d at 1188. A regulation, also known as a legislative rule, is “an agency statement of general *or* particular applicability and future effect designed to . . . prescribe law or policy.” 5 U.S.C. § 551(4) (emphasis added). The Endangerment Finding is a “regulation” because it has the force of law, *Thomas v. New York*, 802 F.2d 1443, 1445-47 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987), and because it is also of “particular applicability,” in that the Endangerment Finding required EPA to promulgate greenhouse gas emissions standards under Section 202 of the Clean Air Act, 42 U.S.C. § 7521(a). “If EPA makes a finding of endangerment, the [a]gency [is required] to regulate emissions of [greenhouse gases] from motor vehicles.” *Coalition for Responsible Reg., Inc. v. E.P.A.*, 684 F.3d 102, 126 (D.C. Cir. 2012), *aff’d in part, rev’d in part sub nom. Util. Air Reg. Group v. E.P.A.*, 134 S. Ct. 2427 (2014), and *amended sub nom.*, quoting *Massachusetts v. EPA*, 127 S. Ct. 1462 (2007). EPA itself acknowledged the Endangerment Finding obligated it to regulate motor vehicle emissions of greenhouse gases. *See* 76 Fed. Reg. at 57,129 (“With EPA’s December 2009 final findings that certain greenhouse gases may reasonably be anticipated to endanger public health and welfare and that emissions of [greenhouse gases] from section 202 (a) sources cause or contribute to that endangerment, section 202(a) *requires* EPA to issue standards applicable to emissions of those pollutants from new motor vehicles.”) (emphasis added). Accordingly, the Endangerment Finding is a regulation subject to the SAB submittal requirement.

B. EPA Provided the Endangerment Finding to the Office of Management and Budget “For Formal Review and Comment”

The SAB statutory language requires EPA to submit any proposed regulation to the Science

Advisory Board for peer review whenever it provides the proposal to “any other Agency for formal review and comment.” 42 U.S.C. 4365. EPA acknowledged that it submitted the Endangerment Finding to the Office of Management and Budget (OMB”) as a “significant regulatory action” pursuant to an overarching executive order:

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a “significant regulatory action” because it raises novel policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to Office of Management and Budget (OMB) recommendations have been documented in the docket for this action.

74 Fed. Reg. 66545 (Dec. 15, 2009). This was a “formal” review mandated by EO 12866, and any notion that the OMB submission was “informal” is belied by the text of the executive order cited by EPA. Specifically, EO 12866 declares:

Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President’s priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget (OMB) shall carry out that review function.

58 Fed. Reg. 51735 (Sept. 30, 1993). EO 12866 goes on to specify in painstaking detail exactly what must be submitted to OMB, and prescribes a “regulatory plan” that must consist “at a minimum” of a statement of the agency’s regulatory objectives, a summary of each planned significant regulatory action including anticipated costs and benefits, a summary of the legal basis for each such action, a statement of the need for each action, the agency’s schedule for action, and other data. 58 Fed. Reg. 51735 (Sept. 30, 1993). The level of detail required indicates that the review is the epitome of formality. Indeed, the submission requirements are taken so seriously that within 10 days of receiving the submission from EPA, OMB is required to circulate it among other federal agencies to check for possible conflicts. *Id.*

Accordingly, EPA made available the proposed Endangerment Finding to another federal agency, namely, OMB, pursuant to Executive Order 12866, and through OMB, to other federal agencies, for formal review, bringing the review of the Endangerment Finding squarely within the ambit of “formal” federal agency review under 42 U.S.C. § 4365(c)(1), thereby triggering the SAB submittal requirement.

C. The Endangerment Finding Was Never “Made Available” by EPA to the Science Advisory Board for Peer Review

The D.C. Circuit has ruled that the mandate to “make available” a regulatory proposal to the SAB for peer review requires that EPA “submit” the proposed regulation to the SAB. *API*, 665 F.2d at 1189 (“the statute *explicitly mandates* that standards be *submitted* to the Board for review.”) (emphasis added). “EPA did not submit the Endangerment Finding for review by its Science Advisory Board.” *Coalition for Responsible Reg., Inc. v. E.P.A.*, 684 F.3d at 124. In addition, EPA admitted in its statements to the public that it never submitted the Endangerment Finding to the SAB for peer review. *See EPA’s Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, Volume 3: Process Issues Raised by Petitioners, pp 17-18, Response to Comment 3-7*, reproduced as **Exhibit G**.

EPA’s statement that the Endangerment Finding was generated as a result of the “far reaching and multidimensional” problem addressed by the finding, *see* 74 Fed. Reg. at 66497, does not excuse its violation of the SAB submittal requirement, because the seriousness of any particular issue facing an administrative agency does not permit it to violate the statute under which it takes administrative action. *See Food and Drug Admin. v. Brown & Williamson*, 529 U.S. 120, 125 (2000) (“Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure

that Congress enacted into law.”) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). Put plainly, Congress placed the burden on EPA to make regulatory proposals available to the Science Advisory Board for peer review, and EPA failed to meet that burden when it made the Endangerment Finding without seeking review from the Board. See *U.S. v. Kirby*, 74 U.S. 482, 486 (1868) (“[a]ll laws should receive a sensible construction.”). Regardless of the extent to which the prior Administration’s substantive determination regarding the Endangerment Finding merits any discretion from the courts, this Administration should correct the palpable procedural violation of the mandatory SAB submittal requirement. See *Bennett*, 520 U.S. at 172 (“It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking.”).

II. The D.C. Circuit’s Decision in *Coalition for Responsible Regulation v. EPA* Does Not Constrain EPA from Reconsidering the Endangerment Finding

The Petitioners are mindful of the D.C. Circuit’s decision in *Coalition for Responsible Regulation v. Environmental Protection Agency*, 684 F.3d 102 (D.C. Cir. 2012), where dozens of petitioners challenged EPA’s Endangerment Finding. One of the challenges was based on EPA’s failure to submit the Endangerment Finding to the SAB for peer review. The panel in the case concluded that (1) it was “not clear” whether the Endangerment Finding was submitted “to any other Federal agency for formal review and comment,” thereby triggering the SAB submittal duty, 684 F.3d at 124, and (2) “even if EPA violated its mandate by failing to submit the Endangerment Finding to the SAB, Industry Petitioners have not shown that this error was ‘of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.’” 684 F.3d at 124.

Although it may not have been “clear” to the panel in *Coalition for Responsible Regulation* whether EPA sought “formal review and comment” of the Endangerment Finding from another

federal agency, it is abundantly clear from the foregoing discussion in Section I. B. that EPA did in fact seek formal review and comment on the Endangerment Finding from the Office of Management and Budget pursuant to Executive Order 12866. By stating that it was “not clear” whether EPA sought formal review from another federal agency, the D.C. Circuit panel acknowledged that it could not determine whether EPA sought “formal review and comment.” Accordingly, the record is open on that issue. *See Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004) (a court’s failure to make a specific ruling on an issue does not constitute binding precedent for that issue).

For three additional reasons set forth in more detail in Subsections II A., B., and C. below, the decision in *Coalition for Responsible Regulation* regarding the Endangerment Finding does not constrain EPA from reconsidering the finding. First, the SAB submittal requirement, which is set forth in a statute separate and independent of the Clean Air Act, is categorically not subject to the “central relevance” and “substantial likelihood” constraints applicable to procedural violations of the Clean Air Act itself. Second, assuming *arguendo* that the Clean Air Act’s “central relevance” and “substantial likelihood” tests apply to the SAB submittal requirement, a “substantial likelihood” that EPA’s regulatory proposals would undergo significant change as a result of SAB review is built into the fabric of the SAB statute and is, therefore, centrally relevant to the issue of whether a proposed regulation, including the Endangerment Finding, would have a substantial likelihood of undergoing significant change as a result of review by the Board. *See* 42 U.S.C. § 4365(c)(1). Third, in any event, EPA has the inherent authority to reconsider a prior rulemaking.

A. The “Central Relevance” and “Substantial Likelihood” Tests Do Not Apply to EPA’s Duty to Submit the Endangerment Finding to the Science Advisory Board for Peer Review

In the D.C. Circuit panel's view, "Industry Petitioners *have not shown* that [the SAB] error was 'of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.'" *Coalition for Responsible Regulation*, 684 F.3d at 124 (emphasis added). The panel's summary conclusion that a specific showing was not made does not address the threshold issue of whether the procedural requirements of the Clean Air Act trump those of the distinct SAB statute. *See Cooper Industries, Inc.*, 543 U.S. at 170 (a court's silence regarding issues is not precedent for future decisions).

EPA's duty to submit regulatory proposals to the Science Advisory Board for peer review applies not only to EPA's regulatory proposals under the Clean Air Act but also to regulatory proposals made under *every* "authority of the Administrator." *See* 42 U.S.C. § 4365(c)(1). Under longstanding principles of statutory construction, the statutory authorities administered by EPA must be construed in a way that makes them consistent with each other, if at all possible. *See Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 524 (1986) (differing statutes should be interpreted so as to be consistent); *United States v. Freeman*, 44 U.S. 556 (1845) ("Statutes *in pari materia* should be taken into consideration in construing a law. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute"); *FAIC Sec., Inc. v. United States*, 768 F.2d 352, 363 (D.C. Cir. 1985) ("All parties to the appeal agree, however, that the two statutes before us cannot be construed to reach different results. Because the NHA shares with the FDIA the common purpose of insuring funds placed in depository institutions; and because its legislative history shows that Congress intended it to create the same insurance protection for investors in savings and loan associations as the Banking Act of 1933 had created for bank depositors, these two statutes are *in pari materia* and must be construed together.") (internal citations omitted); *Motion Picture Ass'n of Am., Inc. v. F.C.C.*, 309 F.3d 796,

801 (D.C. Cir. 2002) (“Statutory provisions *in pari materia* normally are construed together to discern their meaning.”).

The SAB statute contains no “central relevance” or substantial likelihood” test. At the same time, the Clean Air Act places those two limitations only on judicial review of rulemaking procedures mandated by the Clean Air Act itself. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 522 (D.C. Cir 1983) (in amending the CAA in 1977, Congress “wanted to add new procedural protections” in the CAA while “[minimizing] disputes over EPA’s compliance with the new procedures” in the 1977 Amendments to the Clean Air Act, and Congress “did not intend to cut back” on statutory procedural requirements and protections set forth in statutes other than the Clean Air Act). Thus, the “central relevance” and “substantial likelihood” standards set forth in the CAA for procedural violations of that Act, 42 U.S.C. § 7607(d)(8), do not apply to violations of rulemaking procedures mandated by statutes other than the CAA, such as the SAB statute. *See Small Refiner*, 705 F.2d at 522-24.

Under the longstanding interpretive principle of harmonizing statutes that an agency administers, EPA must comply with the SAB submittal requirement consistently for all of its regulatory proposals, regardless of the specific law under which a particular regulation is proposed. This result is required because the SAB submittal requirement does not distinguish among EPA’s substantive regulatory authorities but applies equally to all of them, including the Clean Air Act.

Citing *API*, the D.C. Circuit’s panel decision in *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), incorrectly applied the “central relevance” and “substantial likelihood” tests to the SAB submittal requirement in the context the Endangerment Finding. In so doing, the panel did not recognize that *API* did not analyze nor even address the crucial relationship between EPA’s singular, independent duty to comply with the SAB submittal

requirement and EPA's diverse duties under each of the programmatic statutes it administers. Thus, the panel mistakenly applied the Clean Air Act's unique "critical relevance" and "substantial likelihood" tests to EPA's overarching obligation to submit regulatory proposals, including the Endangerment Finding, to the Science Advisory Board for peer review.⁴

The report of the Standing House Committee on Interstate and Foreign Commerce (the "Committee"), which investigated the need for and crafted the language of the Clean Air Act's 1977 amendments, is particularly instructive. *See* Norman J. Singer, 2A Sutherland Statutes and Statutory Construction § 48:6 (7th ed. 2007) ("The report of the standing committee in each house of the legislature which investigated the desirability of the statute under consideration is often used as a source for determining the intent of the legislature."). The Committee noted that the pre-1977 Clean Air Act lacked sufficient "procedural safeguards" and that broad administrative discretion to promulgate regulations to protect health or the environment must be restrained by thorough and careful procedural safeguards that insure an effective opportunity for public participation in the rulemaking process. *See* H. Rep. 95-294 at 319 (May 12, 1977). Among other things, the Committee concluded that there was a need for "clearly defined procedures applicable to establishing a publicly available record as a basis for decisionmaking" under the Clean Air Act. *Id.* at 320. Of special concern to the Committee were the "new" procedural requirements for cross-examination of witnesses on disputed factual issues, which were added by the 1977 Clean Air Act

⁴ In addition, as discussed in more detail below in Section III, *Coalition for Responsible Regulation* erred in its rote citation of *API* because in that case there was harmless error in that EPA had previously submitted two drafts of the relevant documentation to the Science Advisory Board and had made substantial changes to the regulation at issue there pursuant to the Board's recommendations. In connection with the Endangerment Finding at issue here, however, EPA never submitted anything to the Board.

Amendments in connection with hearings held on rulemaking proposals. To prevent the new procedures from getting bogged down in fine points such as “[whether] a given question involves ‘facts’ or ‘policy’ or whether a given fact is ‘legislative’ or ‘adjudicative,’ . . . the committee has limited the extent to which the Administrator’s decisions on *such* procedural matters [arising under the language of the 1977 Amendments] may be reversed during judicial review.” *Id.* at 322 (emphasis added).

The Committee went on to state that courts may overturn EPA rulemaking under the 1977 Clean Air Act Amendments with regard to

such procedural matters [only if] if the procedural errors ‘were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.’

Id. (emphasis added). Thus, the only procedural violations subject to the high bar set by Congress were the then-new rulemaking procedures established by Congress in the 1977 Clean Air Act Amendments. *See Small Refiner*, 705 F.2d at 522. The independent duty to submit regulatory proposals to the SAB, which is found entirely outside of the Clean Air Act, is independent of, and is not constrained by, the 1977 Clean Air Act Amendments.

The prior Administration failed to comply with the nondiscretionary requirement to submit the Endangerment Finding to the Science Advisory Board for peer review before it was promulgated. That failure is a violation of the SAB statute and not the Clean Air Act. Accordingly, contrary to the summary conclusion of the panel in *Coalition for Responsible Regulation*, EPA’s failure was not subject to the “central relevance” or “substantial likelihood” standard for procedural violations of the Clean Air Act.

It is true that the earlier D.C. Circuit’s decision in *API* summarily applied the Clean Air Act’s “central relevance” and “substantial likelihood” tests to the SAB submittal requirement. But

a “court’s prior judicial construction of a statute trumps a [subsequent] agency construction . . . only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *Cuomo v. Clearing House Ass’n, L.L.C.*, 557 U.S. 519, 548–49 (2009) (citing *Brand X*, 545 U.S. at 982) (emphasis added). Neither *API* nor *Coalition for Responsible Regulation* ever held or even asserted that their construction of the applicability of the “central relevance” and “substantial likelihood” tests to SAB review was mandated by the unambiguous terms of either the Clean Air Act or the SAB statute, or, indeed, both of them when viewed in tandem.

Accordingly, as set forth in more detail in Section II. C, *infra*, this Administration is free to revisit the issue based upon its own legal, policy, and scientific evaluations. Significantly, the Clean Air Act’s “central relevance” and “substantial likelihood” standards *cannot* apply to violations of the SAB submittal requirement in connection with rules promulgated by EPA under any statutory authority *other than* the Clean Air Act because no other EPA administered statute authorizes those tests under any circumstance. Accordingly, consistent with the long-honored principle that different statutes administered by the same agency must be construed harmoniously, EPA should now determine that regulations promulgated by EPA under the Clean Air Act are subject to the same SAB peer review requirements as regulations under “any other authority of the Administrator.” *See* 42 U.S.C. § 4365(c)(1); *see also Parsons*, 474 U.S. at 524.

B. By Enacting the SAB Statute, Congress Itself Implicitly Determined That Peer Review by The Board Is *Always* Centrally Relevant and Carries a Substantial Likelihood of Significant Change in Connection with EPA’s Regulatory Proposals

Assuming *arguendo* that the “central relevance” and “substantial likelihood” tests apply, congressional contemplation of a “substantial likelihood” that EPA’s regulatory proposals would undergo “significant change” as a result of SAB review, and the “central relevance” of such review

for proposed regulations, is built into the very fabric of the SAB statute. *See* 42 U.S.C. § 4365(c)(1). The legislative history makes clear that the SAB’s role in EPA’s rulemaking process is to “be able to preview conflicting claims and advise the [EPA] on the adequacy and reliability of the technical basis for rules and regulations.” *See Joint Explanatory Statement*, H.R. Conf. Rep. 96-722, 3295-96. Congress’ *Joint Explanatory Statement* goes on to state:

Much of the criticism of the Environmental Protection Agency might be avoided if the decisions of the Administrator were fully supported by technical information which had been reviewed by independent, competent scientific authorities.

. . . [T]he intent of [the SAB submittal requirement] is to ensure that the [SAB] is able to comment in a well-informed manner on any regulation that it so desire.

Id. at 3296. That is why SAB submittal is “mandatory.” *API*, 665 F.2d at 1188. “[We] must reject administrative constructions which are contrary to clear congressional intent.” *Chevron*, 467 U.S. at 843 n.9. Accordingly, even under the CAA’s “significant likelihood” standard, the uncertainty created by EPA’s failure to submit the Endangerment Finding to the SAB for peer review indicates a “significant likelihood” that the rule would have been “substantially changed” if such errors had not been made and, therefore, is of “central relevance.” 42 U.S.C. § 7607(d)(8).

Such a result is compelled by *Kennecott Corp. v. EPA*, 684 F.2d 1007 (D.C. Cir. 1982). In *Kennecott*, EPA denied an administrative petition for reconsideration by asserting that its failure to include certain documents in the rulemaking record was not significant because, even if the documents had been included, EPA would have come to the same regulatory conclusion. The D.C. Circuit disagreed, stating that the “absence of those documents . . . makes impossible any meaningful comment on the merits of EPA’s assertions.” *Id.* at 1018. “EPA’s failure to include such documents constitutes reversible error, for the uncertainty that might be clarified by those documents . . . indicates a ‘substantial likelihood’ that the regulations would ‘have been

significantly changed.” *Id.* at 1018-19. Here too, EPA’s failure to make the proposed Endangerment Finding available to the SAB for peer review is improper because the uncertainty regarding the outcome of SAB’s review and EPA’s response indicates a “substantial likelihood” that the regulation would have been “significantly changed” had SAB been consulted.

This conclusion is supported by the attached declaration of Roger O. McClellan, who served as a member of the Science Advisory Board for over three decades, including years of service as a member of the Board’s Executive Committee and its Clean Air Scientific Advisory Committee. The declaration, attached as **Exhibit H**, was filed in the D.C. Circuit in support of one of the Petitioners in the consolidated cases of *Coalition for Responsible Regulation v. EPA* (Case No. 09-1322, Document # 1388587).

Among other things, McClellan’s declaration states that the Endangerment Finding “can have a profound impact on society.” Declaration of Roger O. McClellan ¶ 8. EPA never contested the fact that the Endangerment Finding can have a profound societal impact.

The McClellan Declaration goes on to state that “SAB essentially serves a critical gatekeeper role whose mission is to ensure that EPA’s regulatory proposals are based upon sound scientific and technical principles.” McClellan Decl. ¶ 11. “On many occasions during the long history of SAB, EPA changed its regulatory proposals and schedules based on review and comment by SAB. This has been the rule rather than the exception, which stands to reason, as SAB was created to provide an expert reality check for EPA scientific and technical determinations that inform policy judgments.” McClellan Decl. ¶ 10.

McClellan further states:

I am familiar with EPA’s finding made in December of 2009 that greenhouse gases pose a threat to human health and welfare (the “Endangerment Finding”). The Endangerment Finding is certainly the type of regulatory action that SAB was created to review. It deals with novel,

cutting edge scientific and technical issues that can have a profound impact on society. Those issues require the type of detailed expert scrutiny that SAB review was intended to provide.

McClellan Decl. ¶ 8. Moreover, the declaration states that EPA's long-standing custom and standard operating procedure was to submit regulatory proposals to SAB for review during public comment periods:

I have always understood that EPA's proposed regulations under the Clean Air Act would be made available to the SAB for review at the earliest possible time and no later than the date the regulations are first published in the Federal Register for comment by other federal agencies and the general public.

McClellan Decl. ¶ 7.

Because the purpose of the SAB submittal requirement is to provide SAB an opportunity to make available "its advice and comments [to EPA] on the adequacy of the scientific and technical basis of [regulatory proposals]," 42 U.S.C. § 4365(c)(2), Congress could not have intended that SAB review would be no more than a mere formality or a superfluous gesture. *Moskal v. United States*, 498 U.S. 103 (1990) (courts should give effect to every clause and word of a statute). In fact, Congress intended that EPA's proposed Clean Air Act regulations would significantly evolve, mature, and otherwise change as a result of SAB's scientific and technical advice. Lynn E. Dwyer, *Good Science in the Public Interest: A Neutral Source of Friendly Facts?* 7 Hastings W-N.W. J. Env'tl. L. & Pol'y 3, 6-7 (2000) (SAB was created to function as a scientific and technical peer review panel to provide EPA with guidance, so that the Agency's rulemaking is not based on erroneous or untrustworthy data or conclusions); *see also* McClellan Decl. ¶¶ 10-11.

McClellan goes on to state:

Based upon my more than two decades of experience as a member of SAB, after it was established legislatively, my more than 15 years of service as a

member of the SAB Executive Committee and my knowledge of how SAB interacts with EPA, I believe there is substantial likelihood that the Endangerment Finding would have been substantially changed in response to advice from the SAB had the Endangerment Finding been made available for review prior to its promulgation.

McClellan Decl. ¶ 12.

Accordingly, even if the “substantial likelihood” standards apply to SAB submittals of regulatory proposals made by EPA under the Clean Air Act, those standards are met in the case of the Endangerment Finding.

C. EPA Has Inherent Authority to Reconsider the Endangerment Finding

“Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. When an agency changes its existing position, it need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. But the agency must at least display awareness that it is changing position and show that there are good reasons for the new policy.” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (internal citations and quotation marks omitted). Furthermore, “[a]n initial agency interpretation is not instantly carved in stone [although] reasoned decision-making ordinarily demands that an agency acknowledge and explain the reasons for a changed interpretation. But so long as an agency adequately explains the reasons for a reversal of policy, its new interpretation of a statute cannot be rejected simply because it is new.” *Verizon v. FCC*, 740 F.3d 623, 636 (D.C. Cir. 2014). Accordingly, EPA is free to reconsider the Endangerment Finding.

It matters not that the D.C. Circuit in *Coalition for Responsible Regulation* summarily discounted on extremely narrow grounds, without analysis, a claim that EPA violated the SAB statute when it made the Endangerment Finding without seeking peer review. As indicated in the foregoing discussion, the court did not rule that EPA in fact had no duty to submit the

Endangerment Finding to the Science Advisory Board, merely that there was no clear evidence before the court that the triggers for that duty had been activated. *Coalition for Responsible Regulation*, 684 F. 3d at 124-25. As the Supreme Court observed, “[a]gency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework. . . . [I]n *Chevron* itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy.”). *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005) (citing *Chevron v. NRDC*, 467 U.S. 837, 857-58 (1984)).

Accordingly, EPA may determine as a matter of policy that the Endangerment Finding should have been submitted to the Science Advisory Board for peer review and that EPA’s failure to do so triggers reconsideration of the finding, coupled with submittal to the Board. *See Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742 (1996) (“[regulatory] change is not invalidating. . . .”); *Van Hollen, Jr. v. Fed. Election Comm’n*, 811 F.3d 486, 496 (D.C. Cir. 2016) (“An agency ‘must consider varying interpretations and the wisdom of its policy on a continuing basis.’”) (quoting *Brand X*, 545 U.S. at 981). Indeed, as set forth in Section II. B., above, EPA may adopt such an interpretation even if a court had previously construed the statutory requirement differently. *See Cuomo* 557 U.S. at 548–49. Therefore, EPA is free to revisit the Endangerment Finding based upon the instant Administrative Petition.

III. EPA’S FAILURE TO SUBMIT THE ENDANGERMENT FINDING TO THE SCIENCE ADVISORY BOARD WAS NOT HARMLESS ERROR

A careful review of EPA’s statements about the regulations reveals how critical and necessary it was to have the SAB perform a thorough evaluation of the scientific basis of the proposed rule.

The EPA began its overview of the rule by declaring that “[t]he Administrator has determined that the body of scientific evidence compellingly supports this finding.” 74 Fed. Reg.

66497 (Dec.15, 2009). However, the EPA admitted that it relied almost exclusively on data gathered, sifted, and analyzed by others. *Id.* at 66510-12. The input of the Science Advisory Board would have been of major influence on the evaluation of the body of scientific evidence. *See* McClellan Declaration ¶¶ 2-12. EPA acknowledges that “[p]ublic review and comment has always been a major component of EPA’s process.” 74 Fed. Reg. at 66500. EPA is silent, however, as to why, during that period, it failed to comply with the mandatory obligation to let the experts at the Science Advisory Board opine on the data and science underlying the rule, especially in light of the fact that the public noted the error during the public comment period, as described above in the Statement of Facts. EPA even claimed that “the science is sufficiently certain.” 74 Fed. Reg. 66501 (Dec.15, 2009). Such an assertion would seem to require, at a minimum, that EPA comply with the mandatory duty to submit the science for review by the statutorily established expert organization charged with providing EPA with advice in connection with scientific determinations.

The utter failure of EPA to submit the proposed Endangerment Finding and supporting material to SAB at any stage distinguishes this case from another one where failure had been found to be harmless. In *API*, procedural challenges were raised against the ozone standards established by EPA. There, EPA had submitted two drafts of the criteria document to the Science Advisory Board and had made changes to the criteria based on SAB’s recommendations. 665 F. 2d at 1187-88. The proposed ozone standard, which was based entirely upon the previously submitted criteria, as revised, was itself not submitted to the SAB. In rejecting the challenge, the court found that because the Science Advisory Board had *twice* reviewed the criteria documents, which contained the detailed scientific and technical basis for the standard, it was harmless error that EPA did not submit the documentation for a third review. *Id.* at 1189. In the case of the Endangerment Finding, however, SAB never had the opportunity to review anything. Accordingly, there is no basis to

conclude that the failure of EPA to submit the Endangerment Finding to the Science Advisory Board for peer review could under these circumstances be considered harmless error.

As discussed above in the Statement of Facts section of this Petition, the Endangerment Finding has enormous impact on the power generation and distribution industry, as illustrated by the Clean Power Plan, and on diverse other stationary sources, as illustrated by the PSD and Title V requirements triggered by the finding. In addition, the Endangerment Finding has profound consequences for the transportation industry, especially owners and operators of trucks.

In 2011, the EPA finalized its Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy Duty Engines and Vehicles rule. 76 Fed. Reg. 57106 (Sept. 15, 2011). That rule was expressly based on the earlier Endangerment Finding. *See* 76 Fed. Reg. 57109 (Sept. 15, 2011). The rule covers all new heavy-duty trucks starting with the 2014 model year and imposes stringent new fuel consumption standards on such vehicles. 76 Fed. Reg. 57106 (Sept. 15, 2011). In order to reduce greenhouse gas emissions, EPA determined it could not simply impose requirements for the truck engine; the rule requires fundamental changes to the entirety of the truck. *See* 76 Fed. Reg. 57114 (Sept. 15, 2011). The result of imposing new mandates on both truck engines and truck bodies creates an enormous increase in the cost of trucks. *See* 76 Fed. Reg. 57321 (Sept. 15, 2011). Nevertheless, EPA elected to “make no attempt at determining what the impact of increased costs would be on new truck prices.” *Id.* EPA did, however, recognize that there would be research and development costs of at least \$6.8 million per manufacturer per year for five years. *Id.* These costs will necessarily be passed on to the purchasers of the new trucks.

The economic impacts on stationary and mobile sources throughout the nation have had, and will continue to have, repercussions in the job market, resulting in job losses in the mining, manufacturing, construction, and transportation sectors, among others.

These adverse nationwide economic impacts are directly traceable to the Endangerment Finding, and that is yet another reason why it would be untenable to claim that the failure to submit the finding to the Science Advisory Board for peer review was “harmless error.” Accordingly, EPA should reconsider the Endangerment Finding and, in the process, submit the finding to the Science Advisory Board for peer review.

CONCLUSION

For these reasons, Petitioners respectfully request that the Administrator:

1. Within 180 days of receipt of this Administrative Petition, provide a substantive response to the Petitioners informing them and the public of the commencement of an administrative proceeding to reconsider the Endangerment Finding, *see* 42 U.S.C. Section 7604;
2. During the administrative proceeding:
 - a. provide the public with notice and opportunity for comment, as required by the Administrative Procedure Act and 42 U.S.C. § 7607(d);
 - b. provide interested persons an opportunity for the oral presentation of data, views, or arguments, in accordance with 42 U.S.C. § 7607(d)(5);
 - c. submit the current Endangerment Finding and any appropriate alternatives thereto, as well as all underlying documentation, to the Science Advisory Board for peer review, as required by 42 U.S.C. § 4365(c)(1); and
 - d. based upon the totality of evidence, including input from the Science Advisory Board and public comment, make an independent scientific, technical, policy, and legal evaluation of whether it is appropriate to revise or rescind the Endangerment Finding;
3. Pending completion of the administrative proceeding, suspend the Endangerment Finding and refrain from any rulemaking or enforcement activity based in whole or in part on the Endangerment Finding; and
4. Upon completion of the administrative proceeding, take appropriate final action to revise or rescind the Endangerment Finding.

DATED: May 1, 2017

Respectfully submitted,

Robert Henneke
Theodore Hadzi-Antich
Ryan D. Walters

TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: (512) 472-2728

By: 
Theodore Hadzi-Antich
(512) 615-7956
tha@texaspolicy.com

ATTORNEYS FOR PETITIONERS

cc: Neomi Rao (via Federal Express)
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, N.W.
Washington, DC 20503

Ted Boling (via Federal Express)
Acting Director
President's Council on Environmental Quality
722 Jackson Place, N.W.
Washington, DC 20506

Sarah Dunham (via Federal Express)
Acting Assistant Administrator
Office of Air and Radiation
Mail Code 6101A
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Ave., N.W.
Washington DC 20460

Message

From: Fotouhi, David [Fotouhi.David@epa.gov]
Sent: 1/14/2021 8:27:00 PM
To: Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]; Gustafson, Adam [Gustafson.Adam@epa.gov]
CC: Marks, Matthew [Marks.Matthew@epa.gov]
Subject: RE: Endangerment Funding Petition Denials

Adam may be tied up with personal obligations, so I'm happy to discuss. Could you grab a time from Fletcher?

David Fotouhi

Acting General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

-----Original Message-----

From: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>
Sent: Thursday, January 14, 2021 3:14 PM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Cc: Fotouhi, David <Fotouhi.David@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>
Subject: RE: Endangerment Funding Petition Denials
Importance: High

Melina is attending a moot court, but I think a call with you and David is needed. We are being asked to

Ex. 5 Deliberative Process (DP)

+++++
(202) 564-5647 (o)
(202) 695-6287 (c)

-----Original Message-----

From: Gustafson, Adam <Gustafson.Adam@epa.gov>
Sent: Thursday, January 14, 2021 2:55 PM
To: Williams, Melina <Williams.Melina@epa.gov>
Cc: Fotouhi, David <Fotouhi.David@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>
Subject: Endangerment Funding Petition Denials

Melina,

I understand you have been in touch with Chris Grundler about the endangerment finding petitions. Our understanding now is that

Ex. 5 Deliberative Process (DP)

Ex. 5 AC/DP

I am available to discuss this now if needed.

Sent from my iPhone

Message

From: Fotouhi, David [Fotouhi.David@epa.gov]
Sent: 1/18/2021 4:11:00 PM
To: Gustafson, Adam [Gustafson.Adam@epa.gov]
Subject: RE: Draft Endangerment Finding Petition Denial
Attachments: 20210118 GHG Endangerment Denial w cover letters.docx

Ex. 5 Deliberative Process (DP)

Are you free for a quick call? Let me know what time works.

David Fotouhi

Acting General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

From: Fotouhi, David
Sent: Monday, January 18, 2021 10:19 AM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Subject: RE: Draft Endangerment Finding Petition Denial

Thanks! Taking a look now.

Ex. 5 Deliberative Process (DP)

David Fotouhi

Acting General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

From: Gustafson, Adam <Gustafson.Adam@epa.gov>
Sent: Monday, January 18, 2021 6:44 AM
To: Fotouhi, David <Fotouhi.David@epa.gov>
Subject: Draft Endangerment Finding Petition Denial

DELIBERATIVE

David,

This draft responds to

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

Message

From: Fotouhi, David [Fotouhi.David@epa.gov]
Sent: 1/19/2021 1:41:30 PM
To: adm15.arwheeler.email [adm15.arwheeler.email@epa.gov]
CC: Gunasekara, Mandy [gunasekara.Mandy@epa.gov]; Moor, Karl [Moor.Karl@epa.gov]; Gustafson, Adam [Gustafson.Adam@epa.gov]; Molina, Michael [molina.michael@epa.gov]; Scott, Corey [scott.corey@epa.gov]
Subject: For your signature--CAA Petition Denials
Attachments: 20210118d GHG Endangerment Denial w cover letter.docx; 20210118 GHG NAAQS Denial w cover letter.docx

Sir:

The following two documents are attached to this email in Word format for your signature:

- Denial of Petitions to Reconsider the EPA's Greenhouse Gas Endangerment Finding
- Denial of Petitions to Establish National Ambient Air Quality Standards for Greenhouse Gases, to Regulate Greenhouse Gases under Clean Air Act Section 115, and to Regulate Greenhouse Gases as Hazardous Air Pollutants

Please let me know if you have any questions. If you need the documents sent to you in PDF format, let me know and I would be happy to do so. Once you have signed the documents, OGC will work with OAR to post the denials to the EPA OAR webpage and send them to the petitioners.

Ex. 5 Attorney Client (AC)

Best,

David

David Fotouhi

Acting General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

Message

From: adm15.arwheeler.email [adm15.arwheeler.email@epa.gov]
Sent: 1/19/2021 2:41:59 PM
To: Fotouhi, David [Fotouhi.David@epa.gov]; Gunasekara, Mandy [gunasekara.Mandy@epa.gov]; Moor, Karl [Moor.Karl@epa.gov]; Gustafson, Adam [Gustafson.Adam@epa.gov]; Molina, Michael [molina.michael@epa.gov]; Scott, Corey [scott.corey@epa.gov]
Subject: Endangerment Denial
Attachments: 20210118d GHG Endangerment Denial w cover letter.docx

Thanks Team!

Andrew R. Wheeler
Administrator
U.S. Environmental Protection Agency
(202) 564-4711



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE ADMINISTRATOR

January 19, 2021

Sam Kazman, General Counsel
Competitive Enterprise Institute
1310 L Street, NW, 7th Floor
Washington, D.C. 20005
(202) 331-1010
samlkazman@cei.org

Francis Menton
Law Office of Francis Menton
85 Broad Street, 18th floor
New York, New York 10004
(212) 627-1796
fmenton@manhattancontrarian.com

Theodore Hadzi-Antich
Texas Public Policy Foundation
901 Congress Avenue
Austin, Texas 78701
tha@texaspolicy.com

Harry W. MacDougald
Caldwell Propst & DeLoach LLP
Two Ravinia Drive, Suite 1600
Atlanta, Georgia 30346
(404) 843-1956
hmacdougald@cpdlawyers.com

Dave Wallace, President
FAIR Energy Foundation
805 15th St. NW, Suite 100
Washington, DC 20005
Dave.wallace@fairenergyfoundation.org

*Attorneys for Concerned Household
Electricity Consumers Council and
its members*

Dear Messrs. Kazman, Hadzi-Antich, Wallace, Menton, and MacDougald:

I am responding to your petitions to the U.S. Environmental Protection Agency to reconsider our 2009 Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act.

The EPA has reviewed your petitions and the information available on the issues you raised. For the reasons discussed in the enclosed response, the EPA denies your petitions.

I would like to thank you for your interest in these issues. The EPA looks forward to working with you and other stakeholders as we continue to protect human health and the environment in accordance with law.

Sincerely,

Andrew R. Wheeler

Enclosure

Denial of Petitions to Reconsider the EPA's Greenhouse Gas Endangerment Finding

This document is in response to four petitions requesting that the EPA reconsider its 2009 Endangerment Finding for Greenhouse Gas (GHG). The petitions were submitted by the Concerned Household Electricity Consumers Council (CHECC) on January 20, 2017, the Competitive Enterprise Institute and the Science and Environmental Policy Project (CEI & SEPP) on February 23, 2017,¹ Liberty Packing Company LLC and several other entities represented by the Texas Public Policy Foundation on May 1, 2017, and the FAIR Energy Foundation (received by the Agency in 2019).

As you know, we issued our Endangerment Finding in 2009 in response to the U.S. Supreme Court's holding in *Massachusetts v. EPA*, that under section 202(a)(1) of the Clean Air Act, the EPA must either decide whether greenhouse gases cause or contribute to climate change or provide a reasoned justification for declining to form a scientific judgment. 549 U.S. 497, 533–35 (2007).

Our Endangerment Finding concluded on the basis of scientific evidence from the U.S. Global Climate Research Program, the Intergovernmental Panel on Climate Change, and the National Research Council that certain long-lived and directly emitted greenhouse gases in the atmosphere—the six well-mixed greenhouse gases--may reasonably be anticipated both to endanger public health and to endanger public welfare.

The Endangerment Finding was the subject of ten separate petitions for reconsideration that the EPA denied in 2010. We incorporate by reference our Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, *available at* <https://www.epa.gov/ghgemissions/epas-response-petitions-reconsider-endangerment-and-cause-or-contribute-findings>.

The petitioners brought a judicial challenge following EPA's denial of their reconsideration petitions, and the D.C. Circuit upheld the 2009 Endangerment Finding in 2012. *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 120-26 (D.C. Cir. 2012).

In the intervening years, we have issued several new rules that rely on the Endangerment Finding as a predicate. These include the *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2*, 81 Fed. Reg. 73,478, 73,486 (Oct. 25, 2016); the Affordable Clean Energy Rule, *Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units*, 84 Fed. Reg. 32,520 (July 8, 2019); and *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks*, 85 Fed. Reg. 24,174 (Apr. 30, 2020). In 2016, EPA issued an endangerment finding as the predicate for the airplane greenhouse gas standards. *See Control of Air Pollution From Airplanes and Airplane Engines: GHG Emission Standards and Test*

¹ The Competitive Enterprise Institute and the Science and Environmental Policy Project characterize theirs as a petition “to initiate a rulemaking proceeding on the subject of greenhouse gases and their impact on public health and welfare” or, in the alternative, “as a petition for reconsideration of its Endangerment Finding.” CEI & SEPP Petition at 1.

Procedures, 86 Fed. Reg. 2136, 2143 (Jan. 11, 2021). (The 2016 airplane endangerment finding was based on “[t]he Administrator’s view is that the body of scientific evidence amassed in the record for the 2009 Endangerment Finding also compellingly supports an endangerment finding under CAA section 231(a)(2)(A).” 81 Fed. Reg. at 54,424.)

To the extent we have considered new assessments of the danger posted by greenhouse gases, we have concluded that they “further strengthen[] the case that GHG emissions endanger public health and welfare.” *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2*, 81 Fed. Reg. 73,478, 73,486 (Oct. 25, 2016). We incorporate this discussion by reference.

And we have sometimes responded to comments that question the scientific basis for our Endangerment Finding. *See, e.g., Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles - Phase 2*, EPA-420-R-16-901, at 1435-36 (Aug. 2016). We incorporate those responses here by reference.

The three petitions from CHECC, CEI & SEPP, and the FAIR Energy Foundation each challenge the 2009 Endangerment Finding’s reliance on three lines of evidence that the petitioners allege have been called into question by new scientific research.

Liberty Packing Company and its co-petitioners challenge the EPA’s 2009 Endangerment Finding for not having gone through peer review with Science Advisory Board, for relying on information from international organizations, and for causing adverse economic impacts.

Upon consideration of the four petitions, the EPA concludes that they present insufficient information to warrant revisiting the 2009 Endangerment Finding. EPA therefore denies the petitions.

Message

From: Scott, Corey [scott.corey@epa.gov]
Sent: 1/19/2021 4:14:33 PM
To: Gustafson, Adam [Gustafson.Adam@epa.gov]
CC: Fotouhi, David [Fotouhi.David@epa.gov]; adm15.arwheeler.email [adm15.arwheeler.email@epa.gov]
Subject: Signed Endangerment Denial
Attachments: image2021-01-19-104938.pdf

Adam,

Here is one of the signed documents. I will send the other once the scan comes through. Thanks!

Corey



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE ADMINISTRATOR

January 19, 2021

Sam Kazman, General Counsel
Competitive Enterprise Institute
1310 L Street, NW, 7th Floor
Washington, D.C. 20005
(202) 331-1010
samlkazman@cei.org

Francis Menton
Law Office of Francis Menton
85 Broad Street, 18th floor
New York, New York 10004
(212) 627-1796
fmenton@manhattancontrarian.com

Theodore Hadzi-Antich
Texas Public Policy Foundation
901 Congress Avenue
Austin, Texas 78701
tha@texaspolicy.com

Harry W. MacDougald
Caldwell Propst & DeLoach LLP
Two Ravinia Drive, Suite 1600
Atlanta, Georgia 30346
(404) 843-1956
hmacdougald@cpdlawyers.com

Dave Wallace, President
FAIR Energy Foundation
805 15th St. NW, Suite 100
Washington, DC 20005
Dave.wallace@fairenergyfoundation.org

*Attorneys for Concerned Household
Electricity Consumers Council and
its members*

Dear Messrs. Kazman, Hadzi-Antich, Wallace, Menton, and MacDougald:

I am responding to your petitions to the U.S. Environmental Protection Agency to reconsider our 2009 Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act.

The EPA has reviewed your petitions and the information available on the issues you raised. For the reasons discussed in the enclosed response, the EPA denies your petitions.

I would like to thank you for your interest in these issues. The EPA looks forward to working with you and other stakeholders as we continue to protect human health and the environment in accordance with law.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew R. Wheeler".

Andrew R. Wheeler

Enclosure

Denial of Petitions to Reconsider the EPA's Greenhouse Gas Endangerment Finding

This document is in response to four petitions requesting that the EPA reconsider its 2009 Endangerment Finding for Greenhouse Gas (GHG). The petitions were submitted by the Concerned Household Electricity Consumers Council (CHECC) on January 20, 2017, the Competitive Enterprise Institute and the Science and Environmental Policy Project (CEI & SEPP) on February 23, 2017,¹ Liberty Packing Company LLC and several other entities represented by the Texas Public Policy Foundation on May 1, 2017, and the FAIR Energy Foundation (received by the Agency in 2019).

As you know, we issued our Endangerment Finding in 2009 in response to the U.S. Supreme Court's holding in *Massachusetts v. EPA*, that under section 202(a)(1) of the Clean Air Act, the EPA must either decide whether greenhouse gases cause or contribute to climate change or provide a reasoned justification for declining to form a scientific judgment. 549 U.S. 497, 533–35 (2007).

Our Endangerment Finding concluded on the basis of scientific evidence from the U.S. Global Climate Research Program, the Intergovernmental Panel on Climate Change, and the National Research Council that certain long-lived and directly emitted greenhouse gases in the atmosphere—the six well-mixed greenhouse gases—may reasonably be anticipated both to endanger public health and to endanger public welfare.

The Endangerment Finding was the subject of ten separate petitions for reconsideration that the EPA denied in 2010. We incorporate by reference our Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, *available at* <https://www.epa.gov/ghgemissions/epas-response-petitions-reconsider-endangerment-and-cause-or-contribute-findings>.

The petitioners brought a judicial challenge following EPA's denial of their reconsideration petitions, and the D.C. Circuit upheld the 2009 Endangerment Finding in 2012. *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 120-26 (D.C. Cir. 2012).

In the intervening years, we have issued several new rules that rely on the Endangerment Finding as a predicate. These include the *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2*, 81 Fed. Reg. 73,478, 73,486 (Oct. 25, 2016); the Affordable Clean Energy Rule, *Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units*, 84 Fed. Reg. 32,520 (July 8, 2019); and *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks*, 85 Fed. Reg. 24,174 (Apr. 30, 2020). In 2016, EPA issued an endangerment finding as the predicate for the airplane greenhouse gas standards. *See Control of Air Pollution From Airplanes and Airplane Engines: GHG Emission Standards and Test*

¹ The Competitive Enterprise Institute and the Science and Environmental Policy Project characterize theirs as a petition “to initiate a rulemaking proceeding on the subject of greenhouse gases and their impact on public health and welfare” or, in the alternative, “as a petition for reconsideration of its Endangerment Finding.” CEI & SEPP Petition at 1.

Procedures, 86 Fed. Reg. 2136, 2143 (Jan. 11, 2021). (The 2016 airplane endangerment finding was based on “[t]he Administrator’s view is that the body of scientific evidence amassed in the record for the 2009 Endangerment Finding also compellingly supports an endangerment finding under CAA section 231(a)(2)(A).” 81 Fed. Reg. at 54,424.)

To the extent we have considered new assessments of the danger posted by greenhouse gases, we have concluded that they “further strengthen[] the case that GHG emissions endanger public health and welfare.” *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2*, 81 Fed. Reg. 73,478, 73,486 (Oct. 25, 2016). We incorporate this discussion by reference.

And we have sometimes responded to comments that question the scientific basis for our Endangerment Finding. *See, e.g., Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles - Phase 2*, EPA-420-R-16-901, at 1435-36 (Aug. 2016). We incorporate those responses here by reference.

The three petitions from CHECC, CEI & SEPP, and the FAIR Energy Foundation each challenge the 2009 Endangerment Finding’s reliance on three lines of evidence that the petitioners allege have been called into question by new scientific research.

Liberty Packing Company and its co-petitioners challenge the EPA’s 2009 Endangerment Finding for not having gone through peer review with Science Advisory Board, for relying on information from international organizations, and for causing adverse economic impacts.

Upon consideration of the four petitions, the EPA concludes that they present insufficient information to warrant revisiting the 2009 Endangerment Finding. EPA therefore denies the petitions.

Message

From: Fotouhi, David [Fotouhi.David@epa.gov]
Sent: 1/18/2021 3:18:54 PM
To: Gustafson, Adam [Gustafson.Adam@epa.gov]
Subject: RE: Draft Endangerment Finding Petition Denial
Attachments: image2019-06-05-130207.pdf

Thanks! Taking a look now.

Ex. 5 Deliberative Process (DP)

David Fotouhi

Acting General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

From: Gustafson, Adam <Gustafson.Adam@epa.gov>
Sent: Monday, January 18, 2021 6:44 AM
To: Fotouhi, David <Fotouhi.David@epa.gov>
Subject: Draft Endangerment Finding Petition Denial

DELIBERATIVE

David,

This draft responds to

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

Dave

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

In Re:)	
)	EPA Docket No.
Endangerment and Cause or Contribute)	
Findings for Greenhouse Gases Under)	EPA-HQ-OAR-2009-01
Section 202(a) of the Clean Air Act)	
_____)	

PETITION TO REOPEN AND RECONSIDER
“ENDANGERMENT AND CAUSE OR CONTRIBUTE FINDINGS FOR
GREENHOUSE GASES UNDER SECTION 202(a) OF THE CLEAN AIR ACT”

Filed by

The FAIR Energy Foundation

Dave Wallace
President
FAIR Energy Foundation
805 15th St. NW, Suite 100
Washington, DC 20005
Phone: 410-984-2194
dave.wallace@fairenergyfoundation.org

INTRODUCTION

Pursuant to Section 307(d) of the Clean Air Act, 42 U.S.C. Section 7607(d), the FAIR Energy Foundation submits this Petition to Reopen and Reconsider the “Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act” published by the Environmental Protection Agency (“EPA”) on December 15, 2009 (74 CFR 66496, Dec. 15, 2009)(original EPA Docket No. EPA-HQ-OAR-2009-171)(“Endangerment Finding”).¹ That Finding held that carbon dioxide (CO₂) emissions from the use of fossil fuels endanger the public health and welfare.

EPA explicitly based that Endangerment Finding on three specific “lines of evidence.” 74 C.F.R. at 66518. New scientific research and updated data since adoption of the Endangerment Finding have invalidated all three of those lines of evidence, as discussed in detail below. That research includes the findings of thousands of peer-reviewed articles published by hundreds of recognized, independent, climate scientists working at world-class academic and research institutions across the globe.²

The Petition also draws on the work of William Happer, Cyrus Fogg Brackett Professor of Physics, Emeritus, Princeton University.³ Happer currently serves on the National Security Council as Senior Director of the Office for Emerging Technologies. Happer has also served as a long time member of JASON, an informal organization of scientists providing independent advice to the U.S. government regarding science, technology, and national security.

This Petition also draws on the peer reviewed *Research Report* of Dr. James P. Wallace III, NASA’s esteemed Dr. John R. Christy, and Joseph S. D’Aleo, first published in September, 2016⁴ (“Wallace 2016”), which includes a thorough, comprehensive analysis of all data sets concerning global atmospheric temperatures since the 2009 Endangerment Finding. A supplemental report

¹ Environmental Protection Agency, “Final Rule, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act,” *Federal Register* 74, p. 66,496, December 15, 2009.

² Craig D. Idso, Robert M. Carter, and S. Fred Singer, *Climate Change Reconsidered II: Physical Science* (Chicago, IL: The Heartland Institute, 2013); Craig D. Idso, Sherwood B. Idso, Robert M. Carter, and S. Fred Singer, *Climate Change Reconsidered II: Biological Impacts* (Chicago, IL: The Heartland Institute, 2014); Craig D. Idso, Robert M. Carter, and S. Fred Singer, *Why Scientists Disagree About Global Warming*, Second Edition (Arlington Heights, IL: The Heartland Institute, 2015); Craig D. Idso, David Legates, Roger Bezdek, and S. Fred Singer, *Climate Change Reconsidered II: Fossil Fuels* (Arlington Heights, IL: The Heartland Institute, 2018).

³ See, e.g., William Happer Interview, Focused Civil Dialogue on Global Warming, TheBestSchools.org (2019) <https://thebestschools.org/special/karoly-happer-dialogue-global-warming/william-happer-interview/>.

⁴ Dr. James P. Wallace III, Dr. John R. Christy, and Dr. Joseph S. D’Aleo, *On the Existence of a ‘Tropical Hot Spot’ & the Validity of EPA’s CO₂ Endangerment Finding, Abridged Research Report*, September 2016

produced in 2017⁵ (“Wallace 2017”) further analyzed those global temperature records.

This Petition conclusively invalidates the Endangerment Finding on the grounds discussed below. EPA consequently should withdraw the Endangerment Finding, thus nullifying as well any and all EPA regulations based on that Finding, or replace it with a new Non-Endangerment Finding, no later than 60 days from the filing of this petition.

The FAIR Energy Foundation is not alone in petitioning for reconsideration of the Endangerment Finding. For example, the Competitive Enterprise Institute, in its Petition, noted:

A rulemaking proceeding is appropriate when new developments demonstrate that an existing rule or finding rests on erroneous factual premises, and a rulemaking petition is a proper vehicle for asking an agency “to reexamine” the “continuing vitality” of a rule.⁶

Standing for this Petition is based on the First Amendment to the United States Constitution, which guarantees to all American citizens the right to petition their government for redress of grievances. Standing is also based on injury to the individual members of FAIR Energy Foundation, who are electricity ratepayers who would face massive increases in their electricity rates under policies stemming from the Endangerment Petition.

I. THE CLEAN AIR ACT REQUIRES EPA TO REOPEN AND RECONSIDER THE 2009 ENDANGERMENT FINDING FOR THE SUBMISSION OF NEW EVIDENCE ARISING AFTER THE 2009 ENDANGERMENT FINDING WAS ISSUED.

Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. Section 7607(d)(7)(B), requires the EPA to reopen and reconsider any rule for the submission of information which arose after the formal period for public comment on the Rule has expired, where the information is of “central relevance to the outcome of the

⁵ Dr. James P. Wallace III, Dr. John R. Christy, and Dr. Joseph S. D'Aleo, On the Existence of a ‘Tropical Hot Spot’ & the Validity of EPA’s CO2 Endangerment Finding. Abridged Research Report, Second Edition, April 2017.

⁶ Sam Kazman and Hans Bader, “Petition of the Competitive Enterprise Institute and the Science and Environmental Policy Project for Rulemaking on the Subject of Greenhouse Gases and Their Impact on Public Health and Welfare in Connection With EPA’s 2009 Endangerment Finding, 74 FR 66,496 (Dec. 15, 2009).” Competitive Enterprise Institute, February 23, 2017.

rule.” The 2009 Endangerment Finding is a rule subject to that Clean Air Act requirement.

Section 307(d)(7)(B) of the Clean Air Act provides,

“If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such an objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.

42 U.S.C. Section 7607(d)(7)(B). This Section arose directly out of the legislative history of the Clean Air Act with the Senate expressly recognizing the need to update regulations in light of new information:

“The committee recognizes that it would not be in the public interest to measure for all time the adequacy of a promulgation of any standard or regulation by the information available at the time of such promulgation. In the area of protection of public health and environmental quality, it is clear that new information will be developed and that such information may dictate a revision or modification of any promulgated standard or regulation established under the act. The judicial review section, therefore, provides that any person may challenge any promulgated implementation plan after the date of promulgation whenever it is alleged that significant new information has become available.

S.Rep.No.91-1196, 91st Cong., 2d Sess., 41-42 (1970).

This Petition to Reopen and Reconsider the Endangerment Finding qualifies under Section 307 of the Clean Air Act. The Endangerment Finding was issued on December 15, 2009. But this Petition is based on information arising after that date, published in volumes of peer reviewed research since that time.⁷ These

⁷ William Happer Interview, Focused Civil Dialogue on Global Warming, TheBestSchools.org (2019) <https://thebestschools.org/special/karoly-happer-dialogue-global-warming/william-happer-interview/>.

Craig D. Idso, Robert M. Carter, and S. Fred Singer, *Climate Change Reconsidered II: Physical Science* (Chicago, IL: The Heartland Institute, 2013); Craig D. Idso, Sherwood B. Idso, Robert M. Carter, and S. Fred Singer, *Climate Change Reconsidered II: Biological Impacts* (Chicago, IL: The Heartland Institute, 2014); Craig D. Idso, Robert M.

publications report scientific research and data that did not exist prior to 2009, as discussed below, including global temperature data, which contradict and discredit the three lines of evidence on which the Endangerment Finding was explicitly based.

The D.C. Circuit Court in *Ojato Chapter of the Navajo Tribe v. Train*, 515 F. 2d 654 (D.C. Cir. 1975) explained the three-step process that complainants and the EPA should follow in regard to petitions for reconsideration under the Clean Air Act, writing:

“(1) The person seeking revision of a standard of performance, or any other standard reviewable under Section 307, should petition EPA to revise the standard in question. The petition should be submitted together with supporting materials, or references to supporting materials.

(2) EPA should respond to the petition and, if it denies the petition, set forth its reasons.

(3) If the petition is denied, the petitioner may seek review of the denial in this court pursuant to Section 307.”

Id. at 666.

This Petition follows exactly that first step, starting to build the record for the D.C. Circuit on any necessary appeal. The D.C. Circuit in *Ojato Tribe* in fact remanded the Petition to the EPA for the required consideration on the merits.

Moreover, the D.C. Circuit in *Ojato Tribe* held that “the public’s right to petition the Administrator for revision of a standard of performance and the Administrator’s duty to respond exist completely independently of Section 307 and this court’s appellate jurisdiction.” 515 F.2d at 667. The D.C. Circuit further elaborated in *PPG Indus. Inc. v. Costle*, 659 F.2d 1239, 1250 (D.C. Cir. 1981) that amendment or withdrawal of a Clean Air Act regulation could be obtained under

Carter, and S. Fred Singer, *Why Scientists Disagree About Global Warming*, Second Edition (Arlington Heights, IL: The Heartland Institute, 2015); Craig D. Idso, David Legates, Roger Bezdek, and S. Fred Singer, *Climate Change Reconsidered II: Fossil Fuels* (Arlington Heights, IL: The Heartland Institute, 2018); Dr. James P. Wallace III, Dr. John R. Christy, and Dr. Joseph S. D’Aleo, *On the Existence of a ‘Tropical Hot Spot’ & the Validity of EPA’s CO2 Endangerment Finding. Abridged Research Report*,” September 2016; Dr. James P. Wallace III, Dr. John R. Christy, and Dr. Joseph S. D’Aleo, *On the Existence of a ‘Tropical Hot Spot’ & the Validity of EPA’s CO2 Endangerment Finding. Abridged Research Report, Second Edition*,” April 2017, among so many others.

APA Section 553(e) as well as under Clean Air Act Section 307(d)(7)(B), even past the 60 day period for review, ruling:

“Alternatively, a petition may be filed directly with EPA to interpret or amend the standard, to withdraw the Guidelines, or to specify midnight to midnight reporting procedures. *See* 42 U.S.C. [Section] 7607(d)(7)(B); 5 U.S.C. [Section] 553(e). Either route would provide a reviewing court with a contemporaneous record of the agency’s consideration of this issue, rather than the ‘post hoc rationalizations of counsel.’ *See Oljato Chapter of the Navajo Tribe et al. v. Train*, 515 F.2d 654, 665-68 (D.C. Circuit 1975).”

PPG Indus. Inc. v. Costle, 659 F.2d at 1250. The D.C. Circuit proclaimed the same procedure under the Clean Air Act or the Administrative Procedures Act for petitions to reopen and reconsider EPA rules based on new information arising after the rules were issued in *Group Against Smog & Pollution, Inc. v. EPA*, 665 F.2d 1284, 1290 (D.C. Cir. 1981); *Natural Resources Defense Council, Inc. v. Thomas*, 845 F.2d 1088 (D.C. Cir. 1988), and *Ciba-Geigy Corp. v. EPA* 14 F.3d 1208, 1210 (D.C. Cir. 1995)(agreeing with the reasoning of those cases). EPA itself granted a three month stay of an emissions standard four years after it was issued based on new evidence offered through a Petition to Reconsider. *See* 63 Fed. Reg. 24,479 (May 5, 1998).

In summation, EPA has a duty to reopen and reconsider the Endangerment Finding based on this Petition under Section 307 of the Clean Air Act and under Section 553(e) of the APA, to consider new evidence that has arisen since the 2009 Endangerment Finding was adopted. Indeed, given the substantial evidence raised by this Petition, a summary denial would be an abuse of discretion. *Id.* at 666, n. 19. EPA cannot deny that it has the authority to reopen and reconsider the Endangerment Finding. *See Prill v. NLRB*, 755 F.2d 941, 947-48 (D.C. Cir. 1985) and subsequent related cases.

Moreover, the new evidence raised by this Petition is clearly of central relevance to the Endangerment Finding. As discussed in detail below, this new evidence thoroughly and conclusively invalidates the basis for the Endangerment Finding, as the Endangerment Finding itself states and defines that basis. *Coalition for Responsible Regulation v. EPA*, 684 F.2d 102, 125, 126 (D.C. Cir. 2012)(defining test of central relevance), *reversed on other grounds sub. nom. Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427 (2014). Based on well-established precedent, the D.C. Circuit stands ready to enforce the EPA’s duty to reopen and reconsider the Endangerment Finding if necessary.

II. EPA's 2009 ENDANGERMENT FINDING WAS EXPLICITLY BASED ON CONSIDERATION OF THREE SPECIFIC LINES OF EVIDENCE, ALL OF WHICH HAVE BEEN INVALIDATED BY NEW SCIENTIFIC RESEARCH AND UPDATED DATA SINCE 2009.

EPA's 2009 Endangerment Finding itself expressly identified three specific "lines of evidence" on which it relied. 74 C.F.R. page 66,518. "The first line of evidence arises from our basic physical understanding of the effects of changing concentrations of greenhouse gases, natural factors, and other human impacts on the climate system." *Id.* In other words, EPA relied on human scientific understanding of the effects of increasing atmospheric concentrations of greenhouse gases, such as carbon dioxide (CO₂), and how they would affect global temperatures.

Because of higher specific humidity in the tropics, global warming theory specifies that a "fingerprint" of anthropogenic (human-caused) global warming should appear in the form of a "tropical hot spot" in the troposphere over the tropical latitudes of the Earth. That is why all the climate models used by the U.N.'s Intergovernmental Panel on Climate Change (IPCC), and so by the EPA itself, predict precisely such an accumulating "hot spot" in the atmosphere over the tropics.

"The second line of evidence arises from indirect, historical estimates of past climate changes that suggest that the changes in global surface temperature over the last several decades are unusual." *Id.* In other words, EPA contends global surface temperatures have been rising in unprecedented, increasingly ominous fashion over the past 50 years.

"The third line of evidence arises from the use of computer-based climate models to simulate the likely patterns of response of the climate system to different forcing mechanisms (both natural and anthropogenic)." *Id.* Based on the projections of these models, the Endangerment Finding concludes, "It is extremely unlikely (<5 percent) that the global pattern of warming over the past half century can be explained without external forcing, and very unlikely that it is due to known natural causes alone." *Id.*

A. A Tropical “Hot Spot” Does Not Appear In Any Temperature Record, Flatly Contradicting and Disproving Any Significant Human Role in Causing Global Warming.

Global warming theory, as embodied in all of the dozens of climate models collected by the U.N.’s IPCC, specifies that a “fingerprint” of anthropogenic (human-caused) global warming should appear in the form of a “tropical hot spot” in the troposphere (upper atmosphere) over the tropical latitudes of the Earth. The increased moisture and higher specific humidity of the tropics amplifies the warming effect of greenhouse gases in the tropics. That amplification causes an accumulation of the greenhouse gas warming in the tropical troposphere, with temperatures increasing at higher altitudes, an effect that has been labeled the “tropical hot spot.” This “tropical hot spot” is so fundamental to the theory of anthropogenic global warming that it has been labelled the “human fingerprint” by which anthropogenic global warming can be identified.

But there is one problem with this theory: the so-called human fingerprint of the “tropical hot spot” does not appear in *any* of the 13 most important temperature records of any source, from satellites orbiting the globe and measuring atmospheric temperatures 24/7, to thermometers raised aloft by weather balloons, to ground based weather stations (where the tropical hot spot supposedly accumulating in the upper atmosphere would not be expected to be found).⁸

This is intellectually disabling for the theory of anthropogenic global warming. The Technical Support Document for the Endangerment Finding referenced and relied on the tropical hotspot for its finding of Endangerment, saying if the hotspot were missing it would be “an important inconsistency.”⁹

The federal government also referenced and relied upon the Tropical Hot Spot, and said if the Hot Spot were missing it would be “a potentially serious inconsistency.”¹⁰

⁸ See, e.g., Craig D. Idso et al., *Climate Change Reconsidered II: Biological Impacts*, Nongovernmental International Panel on Climate Change (NIPCC) (Arlington Heights, Ill: The Heartland Institute, 2014); Craig D. Idso et al., *Why Scientists Disagree About Global Warming: The NIPCC Report on Scientific Consensus* (Arlington Heights, Ill: The Heartland Institute, 2016); Wallace 2016.

⁹ Technical Support Document, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, (74 FR 66496, Dec. 15, 2009)(original EPA Docket No. EPA-HQ-OAR-2009-171), p. 50.

¹⁰ U.S. Climate Change Science Program, Synthesis and Assessment Product 1.1, Temperature Trends in the Lower Atmosphere – Understanding and Reconciling Differences, Chapter 1, Section 1.1, The Thermal Structure of the Atmosphere, p. 11, https://www.gfdl.noaa.gov/bibliography/related_files/vr0603.pdf

The IPCC's Fourth Assessment Report (AR4) states that the Tropical Hot Spot is "an integral feature of the physical understanding of the climate's greenhouse warming mechanism."¹¹ EPA's Endangerment Finding explicitly and repeatedly relied upon the U.S. CCSP reports and the IPCC AR4.

Wallace 2016 thoroughly examined the 13 available temperature data sets, applying econometric and regression analysis more sophisticated and complete than the analysis conducted by the IPCC, carried out by brilliant minds well established in the scientific community. The report concludes "These analysis results would appear to leave very, very little doubt but that EPA's claim of a Tropical Hot Spot (THS), caused by rising atmospheric CO2 levels, simply does not exist in the real world."¹² Wallace 2017 reached the same conclusion. The first line of evidence is consequently invalidated.

B. Wallace 2016 and 2017, and the Most Authoritative and Reliable Global Temperature Records, Collected by U.S. Satellites Orbiting Earth 24/7, Show Increasing CO2 Is Not Causing Global Temperatures To Rise.

Wallace 2016 examined all available temperature data sets, whether from U.S. satellites orbiting the Earth 24/7 and measuring global atmospheric temperatures, weather balloons, land-based temperature stations, buoys floating across the seven seas measuring marine temperatures, radiosondes, etc. World class scientists carrying out the study applied the most thorough and sophisticated econometric and regression analysis to that temperature data ever done by mankind, exceeding even the IPCC.

Their conclusion was, "[T]his analysis failed to find that the steadily rising atmospheric CO2 concentrations have had a statistically significant impact on any of the 13 critically important temperature time series data analyzed." Wallace (2016) at 4. That means increased CO2 concentrations had no statistically significant correlation with temperature trends or changes. In other words, the regression analyses showed that more CO2 was not causing the planet to become warmer.

¹¹ IPCC AR4 WG1, Section 9.2.2, The Physical Science Basis, Chapter 9, Figure 9.1 (http://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch9s9-2-2.html) ("Greenhouse gas forcing is expected to produce warming in the troposphere,...").

¹² Dr. James P. Wallace, *supra*, note 7.

Wallace 2016, therefore, showed conclusively, “These results clearly demonstrate – 13 times in fact – that once the ENSO [El Nino/La Nina] impacts on temperature data are accounted for, there is no ‘record-setting’ warming to be concerned about. In fact, there is no ENSO-adjusted warming at all.” Wallace 2016 at 4. This means natural causes were the determinants of temperature trends and changes.

Similarly, Wallace 2017 concluded, “This analysis failed to find that the steadily rising atmospheric CO2 concentrations had a statistically significant impact on any of the 14 temperature data sets that were analyzed.”¹³

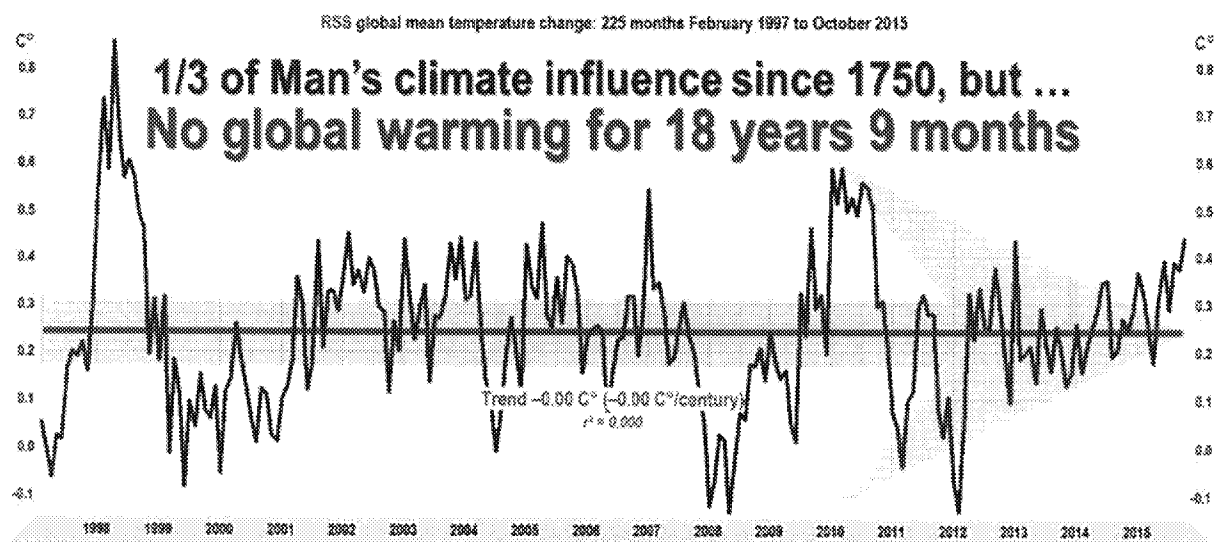
So while the EPA cited the unprecedented, increasingly ominous rise in global temperatures over the last 50 years as the second line of evidence for finding that rising CO2 concentrations endanger the public health and welfare, Wallace 2016 and Wallace 2017, published subsequent to the 2009 Endangerment Finding, found increasing atmospheric concentrations of CO2 played no role in causing any temperature increases. These reports conclusively showed that natural causes, not CO2 concentrations, played the dominant role in global temperature trends over the last 50 years.

U.S. government satellites orbiting the Earth and measuring global atmospheric temperatures 24/7 also document that global warming is over and temperatures are no longer rising. They document further that increased CO2 concentrations have not been causing warming.

The satellite data showed no warming at all for nearly 20 years, or 225 months, from February, 1997 to October, 2015. Yet, the CO2 emissions during that time equaled *one third of all the emissions since the industrial revolution, from 1750 to today.*

Figure 1
RSS Global Mean Temperature Change
225 Months, February 1997 to October 2015

¹³ Wallace 2017 added a 14th temperature data set.



The least-squares trend on the RSS satellite dataset shows no global warming for 18 years 9 months, February 1997 to October 2015, the longest period of the global warming pause—even though one-third of all anthropogenic forcings occurred during that period. *Source:* Christopher Monckton, "Tamper, Tamper! How They Failed to Hide the Gulf Between Predicted and Observed Warming," *Watts Up With That* (website), January 3, 2018.

Indeed, a new study published in the *Journal of Atmospheric and Solar-Terrestrial Physics* in January, 2019, reporting on satellite measured atmospheric temperatures, further reinforced these findings.¹⁴ The authors write,

"The enhancement of the atmospheric greenhouse effect due to the increase in the atmospheric greenhouse gases is often considered as responsible for global warming (known as greenhouse hypothesis of global warming). In this context, the temperature field of global troposphere and lower stratosphere over the period 12/1978–07/2018 is explored using the recent Version 6 of the UAH MSU/AMSU global satellite temperature dataset. Our analysis did not show a consistent warming with gradual increase from low to high latitudes in both hemispheres, as it should be from the global warming theory."¹⁵

No wonder the Wallace Reports found no statistically significant correlation between increasing CO₂ and temperature trends and changes over the last 50 years, and their regression analyses found no statistically significant effect of increased CO₂ in causing increased warming. These sources and their data consequently invalidate EPA's second line of evidence for the 2009 Endangerment Finding.

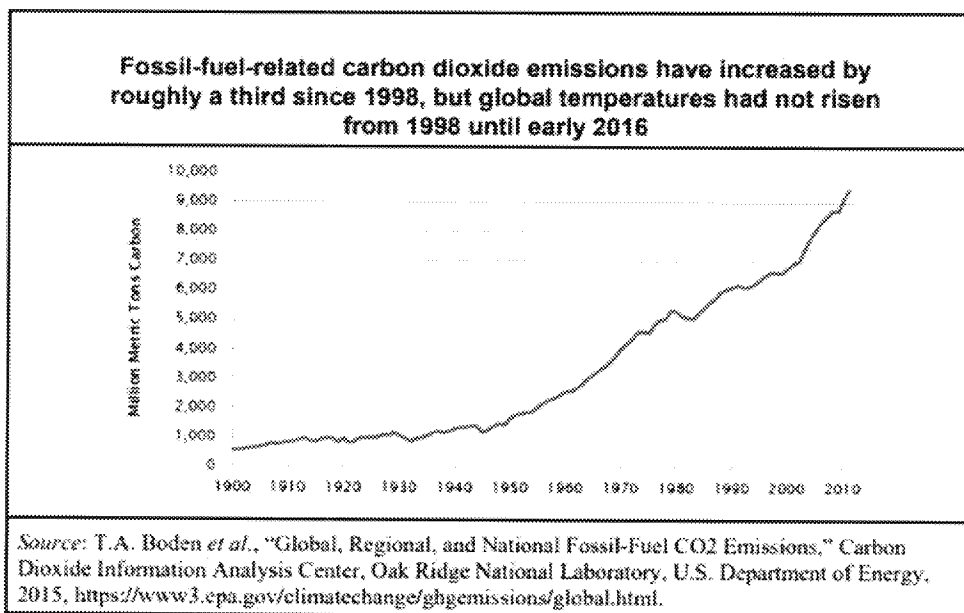
¹⁴ C.A. Varotsos and M.N. Efstathiou, *Has Global Warming Already Arrived?*, *Journal of Atmospheric and Solar-Terrestrial Physics*, Volume 182, January, 2019, at 31-38.

¹⁵ *Id.*, at 31.

- C. Even the Official Global Surface Temperature Record, Which Has Been Tampered with to Promote Global Warming Hysteria, Has Not Followed the Pattern of Increased Atmospheric Concentrations of CO₂. Rather, That Temperature Record Has Followed the Pattern of Natural Causes, Primarily Ocean Cycles and Solar Activity.

The pattern of increased atmospheric concentrations has curved up and up since the turn of the 20th Century, as shown in Figure 2 below:

Figure 2
Fossil Fuel Carbon Dioxide Emissions Since 1900



Even the official surface temperature record, which global warming hysterics have tampered with in recent decades to accentuate a warming pattern, does not track increased CO₂ emissions over the 20th Century. Instead, temperatures have tracked long established patterns of natural cycles, as discussed below.

Ocean Cycles

The increase in global temperatures starting in the late nineteenth century reflects the natural end of the Little Ice Age, a period of global temperatures persisting 2-3 degrees F cooler than previously, which lasted from about 1350 AD to about 1850 AD. Global temperature trends since then have followed *not* rising, then soaring

Carbon Dioxide emission trends, but the natural ocean temperature cycles of the Pacific Decadal Oscillation (PDO) and the Atlantic Multidecadal Oscillation (AMO). Every 20 to 30 years, the much colder water near the bottom of the oceans cycles up to the top, where it has a slight cooling effect on global temperatures until the sun warms that water. That warmed water then contributes to slightly warmer global temperatures, until the next churning cycle.¹⁶

Those natural ocean temperature cycles, and the continued recovery from the Little Ice Age, are primarily why global temperatures rose from 1915 until 1945, when CO2 emissions were much lower than in recent years. The change to a cold ocean temperature cycle, primarily the PDO, is the main reason global temperatures declined from 1945 until the late 1970s, despite soaring CO2 emissions during that time from the postwar industrialization spreading across the globe.¹⁷

The 20 to 30 year ocean temperature cycles turned back to warm from the late 1970s until the late 1990s, which is the primary reason that global temperatures warmed during this period. But that warming ended 20 years ago. Global temperatures have stopped increasing since the late 1990s, if not actually cooled, even though global CO2 emissions have soared over this period.¹⁸

As *The Economist* magazine reported in March, 2013,

“Over the past 15 years air temperatures at the Earth’s surface have been flat while greenhouse gas emissions have continued to soar. The world added roughly 100 billion tonnes of carbon to the atmosphere between 2000 and 2010. That is about a quarter of all the CO2 put there by humanity since 1750.”¹⁹

Yet, still no warming during that time. Global warming ended in concert with the natural 20 to 30 year ocean temperature cycles, in spite of soaring CO2 emissions.

¹⁶ William Happer Interview, Focused Civil Dialogue on Global Warming, TheBestSchools.org (2019) <https://thebestschools.org/special/karoly-happer-dialogue-global-warming/william-happer-interview/>; Craig D. Idso et al., *Climate Change Reconsidered II, Physical Impacts*, Nongovernmental International Panel on Climate Change (NIPCC) (Arlington Heights, Ill: The Heartland Institute, 2013); Craig D. Idso et al., *Why Scientists Disagree About Global Warming: The NIPCC Report on Scientific Consensus* (Arlington Heights, Ill: The Heartland Institute, 2016).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ A Sensitive Matter, *The Economist*, March 30, 2013.

These observed temperature trends demonstrate, in further confirmation of the Wallace Reports, that the supposed Carbon Dioxide greenhouse effect is weak and marginal compared to natural causes of global temperature changes, as should have been expected all along.

All of these sources and data further invalidate the second line of evidence cited for the 2009 Endangerment Finding.

Solar Sunspot Patterns²⁰

At first the current stall out of global warming was due to the ocean cycles turning back to cold. But something much more ominous has developed over the past 20 years of no global warming.

Sunspot activity runs in 11-year short term cycles, with longer cyclical trends of 90 and even 200 years. The number of sunspots declined substantially in recent cycles after flattening out over the previous 20 years. But in the most recent cycle sunspot activity collapsed. NASA's *Science News* report for Jan. 8, 2013 stated,

“Ongoing Solar Cycle 24 [the current short term 11-year cycle] is the weakest in more than 50 years. Moreover, there is controversial evidence of a long-term weakening trend in the magnetic field strength of sunspots. Matt Penn and William Livingston of the National Solar Observatory predict that by the time Solar Cycle 25 arrives, magnetic fields on the sun will be so weak that few if any sunspots will be formed. Independent lines of research involving helioseismology and surface polar fields tend to support their conclusion.”

“Solar Variability and Terrestrial Climate,” *NASA Science* (website), January 8, 2013. This is ominous because such changes in sunspot activity heralded the beginning of the Little Ice Age in 1350 AD. This new NASA concern has been echoed worldwide. The *Voice of Russia* reported on April 22, 2013,

“Global warming which has been the subject of so many discussions in recent years, may give way to global cooling. According to scientists from the Pulkovo Observatory in St.Petersburg, solar activity is waning, so the average yearly temperature will begin to decline as well. Scientists from

²⁰ Much of this discussion was excerpted from Peter Ferrara, “To the Horror of Global Warming Alarmists, Global Cooling Is Here,” *Forbes* (website), May 26, 2013.

Britain and the US chime in saying that forecasts for global cooling are far from groundless.”

Anthony Watts, “Russian Scientists Say Period of Global Cooling Ahead Due to Changes in the Sun,” *Watts Up With That?* (website), April 29, 2013. That report quoted Yuri Nagovitsyn of the Pulkovo Observatory saying, “Evidently, solar activity is on the decrease. The 11-year cycle doesn’t bring about considerable climate change – only 1-2%. The impact of the 200-year cycle is greater – up to 50%. In this respect, we could be in for a cooling period that lasts 200-250 years.” *Id.* In other words, another Little Ice Age.

The *German Herald* reported on March 31, 2013,

“German meteorologists say that the start of 2013 is now the coldest in 208 years - and now German media has quoted Russian scientist Dr Habibullo Abdussamatov from the St. Petersburg Pulkovo Astronomical Observatory [saying this] is proof as he said earlier that we are heading for a "Mini Ice Age." Talking to German media the scientist who first made his prediction in 2005 said that after studying sunspots and their relationship with climate change on Earth, we are now on an ‘unavoidable advance towards a deep temperature drop.’”

Geoff Brown, “Mini Ice Age Has Started – Prof Warns,” *The Australian Climate Skeptics Blog* (website), April 1, 2013. Belief in a looming global warming catastrophe has sharply declined in formerly staunch Europe following increasingly severe winters, which recently have continued into spring. Christopher Booker explained in *The Sunday Telegraph* on April 27, 2013,

“Here in Britain, where we had our fifth freezing winter in a row, the Central England Temperature record – according to an expert analysis on the US science blog Watts Up With That – shows that in this century, average winter temperatures have dropped by 1.45C, more than twice as much as their rise between 1850 and 1999, and twice as much as the entire net rise in global temperatures recorded in the 20th century.”

Christopher Booker, “The Mercury Is Falling. But Our MPs Are Full of Hot Air,” *The Telegraph* (website), April 27, 2013. A news report from India stated, “March in Russia saw the harshest frosts in 50 years, with temperatures dropping to –25° Celsius in central parts of the country and –45° in the north. It was the coldest spring month in Moscow in half a century... Weathermen say spring is a full month

behind schedule in Russia.” Vladimir Radyuhin, “Down to Minus 45,” *The Hindu* (website), April 22, 2013. The news report summarized in 2013,

“Russia is famous for its biting frosts but this year, abnormally icy weather also hit much of Europe, the United States, China and India. Record snowfalls brought Kiev, capital of Ukraine, to a standstill for several days in late March, closed roads across many parts of Britain, buried thousands of sheep beneath six-metre deep snowdrifts in Northern Ireland, and left more than 1,000,000 homes without electricity in Poland. British authorities said March was the second coldest in its records dating back to 1910. China experienced the severest winter weather in 30 years and New Delhi in January recorded the lowest temperature in 44 years.”

Id. Booker adds, “[In early 2014] it was reported that 3,318 places in the USA had recorded their lowest temperatures for this time of year since records began. Similar record cold was experienced by places in every province of Canada. So cold has the Russian winter been that Moscow had its deepest snowfall in 134 years of observations.” Booker, *The Telegraph*, *supra*.

Britain’s Met Office, an international cheerleading headquarters for global warming hysteria, conceded in December, 2013 that there would be no further warming at least through 2017, which would make 20 years with no global warming. That reflected grudging recognition of newly developing trends. Of course, that prediction has now been borne out in reality.

All of this is echoed in *Why Scientists Disagree About Global Warming*, which states, “Forward projections of solar cyclicity imply the next few decades may be marked by global cooling rather than warming, despite continuing CO2 emissions.” Craig D. Idso, *et al.*, *Why Scientists Disagree About Global Warming*, *supra* note 2, p. 4.

Is global climate coming full circle in regard to the Little Ice Age? Indeed, on much longer term cycles going back thousands of years, the Earth is overdue for a return of a real, full Ice Age.

- D. “Global temperature” projections of unverified “climate models,” which involve hypothetical forecasts of, *not real world evidence of*, global warming, have increasingly diverged from the most reliable temperature records computed from the data collected by U.S. satellites. Satellite data indicate global warming stopped 20 years ago, falsifying the models.

EPA’s scientific foundation for potentially catastrophic, anthropogenic, global warming is based on the temperature projections of dozens of global climate models voluntarily developed and contributed to the IPCC by scientists across the globe. These climate models are not solid science. They are merely speculative scenarios about climate, *none of which have been validated by the historical temperature record*. The scientific method involves testing a falsifiable hypothesis with experiments and evidence. Climate model projections do not involve any such falsifiable hypothesis, so they are not an exercise of the scientific method.

Even the modelers themselves recognize and admit their models are not designed to produce *predictions* of future temperatures, but just “what if” *projections* of the results of unproven assumptions, to provide some indications, not scientific proof, of future scenarios that could occur if the assumptions turn out to be correct. The *Summary for Policymakers Climate Change Reconsidered II: Physical Science* states, “The science literature is replete with admissions by leading climate modelers that forcings and feedback are not sufficiently well understood, that data are insufficient or too unreliable, and that computer power is insufficient to resolve important climate processes.” Craig D. Idso, et al., *Climate Change Reconsidered II: Physical Science, Summary for Policymakers* (Chicago, IL: Heartland Institute for the Nongovernmental International Panel on Climate Change, 2013), p 6.

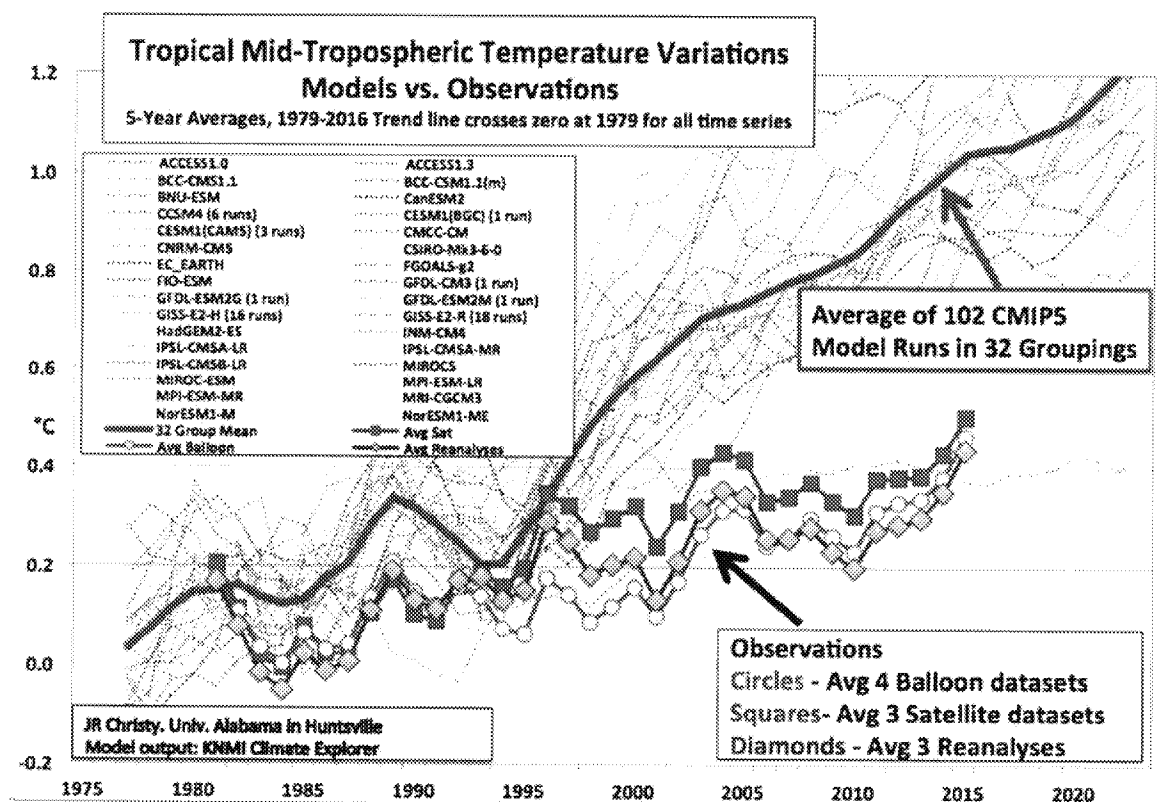
Moreover, none of the models adequately accounts for the Pacific and Atlantic Ocean temperature cycles. None takes into account solar activity cycles indicated by variations in the number and size of sunspots, variations in solar magnetic fields, or cosmic rays flux, all of which are known to significantly affect climate. These cycles have produced major climate changes in the past, such as the Little Ice Age (AD 1350 to about 1850), Medieval Warm Period (about AD 950 to 1250)—during which ‘global temperatures’ were higher than today—and the early twentieth century warm period from 1915 to 1945.

These design flaws explain why the projections of *all* climate models have now diverged so far from the actual temperatures experienced over the past two

decades. As shown in Figure 1 above, there has been no global warming for nearly 20 years, *which none of the models projected*, which further falsifies the models.

The projections of the models, and their increasing divergence from real world temperature observations, are shown in Figure 3 below. The graph was created by NASA scientist Dr. John Christy, Ph.D., who, with his colleagues at the University of Alabama in Huntsville, monitors atmospheric temperatures as computed from the data collected by U.S. satellites.

Figure 3
IPCC Climate Models Consistently Overstate Warming Climate



Climate models have consistently overestimated the amount of future global warming and are not a reliable basis for public policy. Source: John Christy, Testimony before the U.S. House Committee on Science, Space & Technology, March 29, 2017, p. 5.

The actual atmospheric temperatures recorded by U.S. weather satellites and weather balloons are shown by lines at the bottom of the graph, connecting the squares or the circles. The average of the climate models is the solid red line going through the spaghetti of lines representing the projections of each model. The

average projection is well above the observed real-world temperatures, with the divergence growing over time.

This growing divergence of the models from reality definitively invalidates and falsifies the third line of evidence for the Endangerment Finding, as does

- the inability of the models to account for the global temperature cycles and changes of the past century;
- the inability of the models to account for the Little Ice Age and the Medieval Warm Period over the past 1000 plus years;
- the projection by all models of a Tropical Hot Spot that doesn't exist in the real world;
- the analysis of all temperature records in Wallace 2016 and Wallace 2017.

What is most shocking is how weak the models are as any sort of evidence at all for the idea of catastrophic anthropogenic global warming.

E. Conclusion: While Increased CO2 Concentrations Have Some Effect In Increasing Global Temperatures, Nature and Natural Causes Are The Dominant Factors Causing Global Temperatures Patterns, Which Is Why There Is No Prospect of Catastrophic, Human Caused Global Warming.

Although rising concentrations of atmospheric carbon dioxide will have some effect on future global temperatures, the IPCC and hence EPA, have greatly overestimated this influence.

The inability of the IPCC climate models to accurately predict observed temperatures (discussed in Section D above), coupled with the “global warming hiatus” – a lack of any statistically significant global warming from 1998 to the El Nino of 2015/2016 – a period during which approximately one-third of all human caused carbon dioxide emissions were released into the atmosphere – indicate the

climate models used to justify onerous regulations on carbon dioxide emissions do not match reality, and, therefore, constitute no basis for public policy.²¹

Additionally, approximately 0.4 degrees C of warming occurred before 1950. This means only 0.5 degrees of warming has occurred since humans began to emit CO₂ into the atmosphere in any appreciable quantity. This provides further evidence supporting the conclusion that the models are predicting too much warming, and the likely impact of increasing CO₂ in the atmosphere is overstated.

III. Carbon Dioxide Emissions from Continued Use of Fossil Fuels Pose No Threat of Catastrophic Global Warming.

- A. Carbon dioxide (CO₂) cannot be considered “pollution.” It is essential to plant photosynthesis, and a highly beneficial substance produced by the natural environment. *Massachusetts v. EPA* was wrong to decide it is air pollution and so authorize EPA to create global warming regulation under the Clean Air Act.**

Congress never enacted any authority designed to regulate CO₂ or other “greenhouse gas” emissions. Under our Constitution and system of government, Congress has the power to legislate, expressing the will of the people. The decision must be left to Congress whether and how to address the issue of global warming/climate change. Congress must decide how real the threat is and what costs the people can be forced to bear to address it.

Despite Congress’s clear authority in this matter, in *Massachusetts v. Environmental Protection Agency*, 549 US 497 (2007), the U.S. Supreme Court ruled in favor of plaintiffs who argued human Carbon Dioxide (CO₂) emissions met the technical definition of a “pollutant” under the Clean Air Act. While the Supreme Court did not rule that EPA *must* regulate and restrict CO₂ emissions, the Court effectively ruled that Congress gave EPA authority under the Clean Air Act to decide whether and how to regulate CO₂ emissions under the standards of the Clean Air Act, which authorizes regulation to protect human health and welfare.

²¹ John C. Fyfe, et al., “Making Sense of the Early 2000s Warming Slowdown,” *Nature Climate Change*, February 24, 2016; G. Marland, T.A. Boden and R. J. Andres, “*Global, Regional, and National Fossil Fuel Emissions*,” Carbon Dioxide Information Analysis Center, Oak Ridge National Laboratory, U.S. Department of Energy.

As late as December 18, 2008, after the election of Barack Obama but before he assumed office, EPA itself held the position that the science did *not* support a finding that carbon dioxide emissions posed a threat to public health or welfare. David A. Fahrenthold and Steven Mufson, “EPA Eases Emissions Regulations for New Power Plants,” *Washington Post*, December 19, 2008. It was only after EPA issued its Endangerment Finding on December 15, 2009, almost a year after Obama assumed office, that EPA assumed authority to regulate carbon dioxide emissions as a threat to human health and welfare, consistently with President Obama’s policy preferences.

President Trump’s efforts to end Obama’s war on coal, and American energy more generally, may come to naught unless he instructs EPA to rescind its 2009 “Endangerment Finding” against CO₂, which was the legal foundation for the Clean Power Plan and many other rules and regulations designed to cripple the energy sector, coal most of all. If that foundation is not removed, future administrations could bring back from the dead all of the Obama-era, zombie regulations, related to CO₂ emissions. Isaac Orr and Fred Palmer, “How to Prevent the Premature Retirement of Coal-Fired Power Plants,” *Policy Study* No. 148, The Heartland Institute, February 2018.

EPA’s Endangerment Finding reads:

The Administrator finds that six greenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations. The Administrator also finds that the combined emissions of these greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas air pollution that endangers public health and welfare under CAA section 202(a). These Findings are based on careful consideration of the full weight of scientific evidence and a thorough review of numerous public comments received on the Proposed Findings published April 24, 2009 (emphasis added).

Environmental Protection Agency, “Final Rule, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act,” *Federal Register* 74, p. 66,496, December 15, 2009.

Because EPA decided greenhouse gases from human civilization’s use of fossil fuels, primarily due to CO₂ emissions, endanger human health and welfare, the agency has legal authority under the Clean Air Act (CAA) to regulate those gases, based on the Supreme Court’s ruling in *Massachusetts v. Environmental*

Protection Agency. But if the Endangerment Finding is not valid and is withdrawn, and CO2 does not endanger human health and welfare, EPA's authority to regulate fossil fuel use and CO2 emissions in the name of global warming/climate change is not valid and would be nullified.

Carbon dioxide is a naturally occurring gas that makes up only .04 percent, or 400 parts per *million*, of the atmosphere. Only about 3 percent of that tiny amount is generated by human activities, with the rest coming from natural sources and cycles. In 2003, EPA determined that "Congress has not granted EPA authority under the Clean Air Act to regulate CO2 and other greenhouse gases for climate change purposes" and "setting GHG emission standards for motor vehicles is not appropriate at this time." Environmental Protection Agency, "EPA Denies Petition to Regulate Greenhouse Gas Emissions from Motor Vehicles," news release, August 28, 2003.

That was wise because Carbon Dioxide is a naturally produced, naturally occurring substance, actually essential to the survival of all life on the planet. Without Carbon Dioxide in the atmosphere, plants would die. Without plants at the bottom of the food pyramid, there would not be any food for animals, including humans. These are the reasons why it is nonsensical to call Carbon Dioxide "pollution," and why *Massachusetts v. EPA* was wrongly decided.

But President Obama saw in the Endangerment Finding a way to "weaponize" EPA against the coal industry, and other fossil fuel energy. Immediately after taking office in 2009, he put EPA to work supporting rather than opposing the plaintiffs in *Massachusetts v. EPA*, which came to an erroneous conclusion in labelling the natural substance Carbon Dioxide as pollution. His administration overruled decades of science and bipartisan policy and ignored or tried to refute the comments and testimony of hundreds of experts and even its own staff. See Tim Benson, "Comments, Petitions, and Testimony Opposing the Endangerment Finding," January 17, 2017, The Heartland Institute; Alan Carlin, "Proposed NCEE Comments on Draft Technical Support Document for Endangerment Analysis for Greenhouse Gas Emissions Under the Clean Air Act," Office of Policy, Economics and Innovation, Environmental Protection Agency, March 9, 2009. On December 15, 2009, less than a year after Obama was sworn into office, EPA declared carbon dioxide was indeed a threat in need of regulation. Environmental Protection Agency, "Final Rule, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act," *Federal Register* 74, p. 66,496, December 15, 2009.

The Endangerment Finding was used by the Obama administration to justify dozens of regulations aimed at destroying the coal industry. It also has become a factor in infrastructure and natural resource permitting decisions affecting oil and natural gas. Federal courts have ruled regulatory agencies such as the Federal Energy Regulatory Commission (FERC) and Bureau of Land Management (BLM) did not properly evaluate whether permitting pipelines or approving the extension of coal mining leases would contribute to greenhouse gas emissions. Robert Walton, “DC Circuit Rejects FERC Approval of Southeast Pipeline Project Over Climate Concerns,” *Utility Dive* (website), August 23, 2017; Barbara Grzincic, “U.S. Failed to Consider Climate in Mine Lease Extensions - 10th Circuit,” Reuters, September 15, 2017. Such rulings have a chilling effect on infrastructure projects and permits for natural resource development as environmental groups use the Endangerment Finding to delay or stop these projects.

The Trump administration will have little long-term success in promoting “clean and safe development of our Nation’s vast energy resources”, while at the same time avoiding regulatory burdens that “unnecessarily encumber energy production, constrain economic growth, and prevent job creation,” President Donald Trump, “Presidential Executive Order on Promoting Energy Independence and Economic Growth,” March 28, 2017, unless it can rescind the Endangerment Finding. The good news is that there are ample legal and scientific grounds for such a rescission.

B. The Greening of Planet Earth: Increased atmospheric concentrations of CO₂ actually promote plant growth, fostering the process of photosynthesis, which makes CO₂ essential to the survival of all life on the planet (some “pollution”).

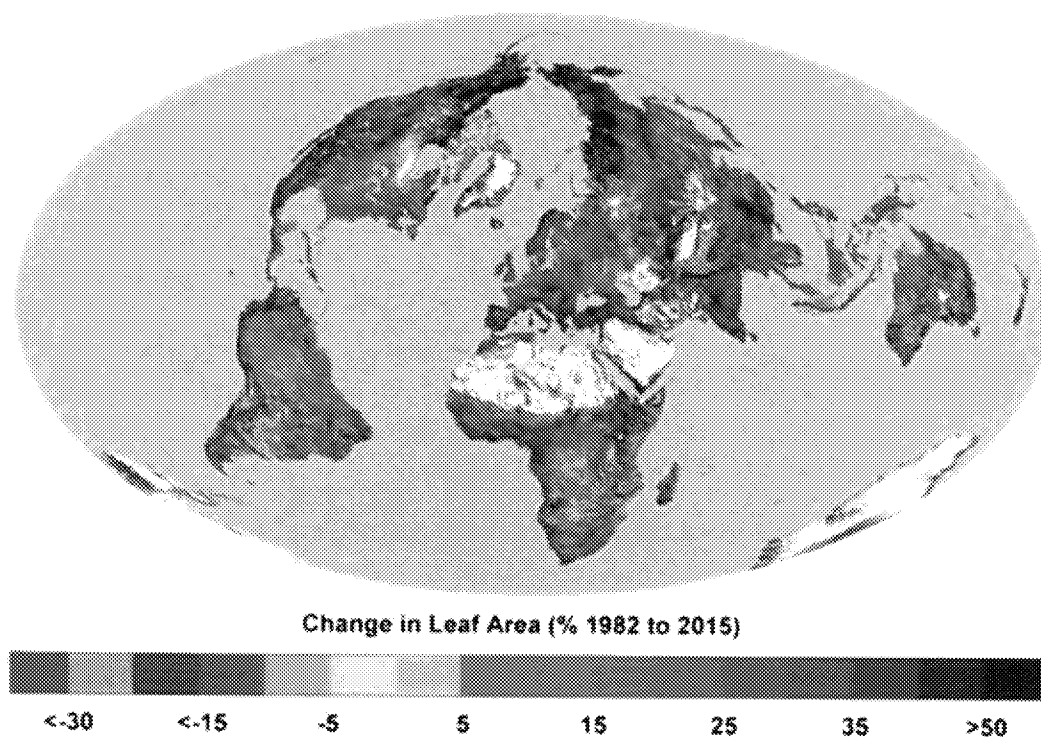
All across the planet, the historical increase in the atmosphere’s CO₂ concentration has stimulated vegetative and agricultural productivity. This observed stimulation, or greening of the Earth, has occurred in spite of many real and imagined assaults on Earth’s vegetation, including fires, disease, pest outbreaks, deforestation, and climatic change.

Results obtained under 3,586 separate sets of experimental conditions conducted on 549 plant species reveal nearly all plants experience increases in dry weight or biomass in response to atmospheric CO₂ enrichment. Additional results obtained under 2,094 separate experimental conditions conducted on 472 plant species reveal nearly all plants experience increases in their rates of photosynthesis in

response to atmospheric CO₂ enrichment.²² These observations have been found not only in experiments, but also in the observed environment of forest, grassland, and cropland.

According to a 2016 article in the scientific journal *Nature Climate Change*, by an international team of 32 authors from 24 institutions in eight countries, the ongoing rise in the global atmospheric concentration of CO₂ is causing a great greening of the Earth. (See Figure 19). Zaichun Zhu, *et al.*, “Greening of the Earth and its Drivers,” *Nature Climate Change*, April 25, 2016.

Figure 4
The Greening of the Earth



Significant greening has occurred on 25 to 50 percent of the Earth's vegetated land. In contrast, just 4 percent of vegetated land has suffered from plant loss. Seventy percent of this greening was due to increasing concentrations of carbon dioxide in the atmosphere. Graphic from Roger Harrabin, “Rise in CO₂ has ‘Greened Planet Earth,’” BBC News, April 25, 2016.

²² Craig D. Idso et al., “Summary for Policymakers, Climate Change Reconsidered II, Biological Impacts,” Nongovernmental International Panel on Climate Change, 2014.

The study involved using satellite data from NASA's Moderate Resolution Imaging Spectrometer and the National Oceanic and Atmospheric Administration's Advanced Very High Resolution Radiometer instruments to help determine the leaf area index, or amount of leaf cover, over the planet's vegetated regions. The greening represents an increase in leaves on plants and trees equivalent in area to two times the continental United States. Roger Harrabin, "Rise in CO₂ has 'Greened Planet Earth,'" BBC News, April 25, 2016.

Results showed that carbon dioxide fertilization explains 70 percent of the greening effect, said co-author Ranga Myneni, a professor in the Department of Earth and Environment at Boston University. "The second most important driver is nitrogen, at 9 percent. So we see what an outsized role CO₂ plays in this process." *Id.* Increased CO₂ also helps plants retain moisture and increases their ability to survive and thrive in drought-like conditions.

Atmospheric CO₂ enrichment enhances plant growth, development, and ultimate yield (in the case of agricultural crops) by increasing the concentrations of plant hormones that stimulate cell division, cell elongation, and protein synthesis. *Id.* This means that, far from endangering human health and welfare under Clean Air Act section 202(a), more atmospheric CO₂ actually improves human health and welfare.

What could be more ironic than increased atmospheric concentration of Carbon Dioxide causing an actual greening of the planet? This is further confirmation that such Carbon Dioxide presents no threat of catastrophic results from global warming. Rather, it means that such increased Carbon Dioxide has actually been environmentally beneficial, and that the so-called "social cost" of carbon is actually less than zero, amounting to a net benefit, even increasing GDP through increased agricultural production. This is why Happer argues that CO₂ does not endanger mankind, but benefits mankind. William Happer Interview, Focused Civil Dialogue on Global Warming, TheBestSchools.org (2019) <https://thebestschools.org/special/karoly-happer-dialogue-global-warming/william-happer-interview/>.

- C. There is a natural limit to any CO₂ caused global warming, as the effect of CO₂ in causing warming declines logarithmically asymptotically to zero, as CO₂ concentration increases.**

Climate models consistently fail to accurately predict global temperature because they assume carbon dioxide will have a larger warming effect on the planet than

has been observed. This is called “climate sensitivity”: how much the planet will warm in response to increasing concentrations of carbon dioxide in the atmosphere. Tim Wogan, “Earth’s Climate May Not Warm as Quickly as Expected, Suggest New Cloud Studies,” *Science*, May 25, 2016.

The relationship between carbon dioxide levels and temperature is not one-to-one: If carbon dioxide levels in the atmosphere double, this does not mean temperatures will double. But how much *will* the temperature increase? That is a key question in the ongoing scientific debate over anthropogenic climate change. As explained by Orr and Palmer:

“The temperature change associated with a doubling of atmospheric carbon dioxide concentrations is referred to as Equilibrium Climate Sensitivity (ECS).”²³

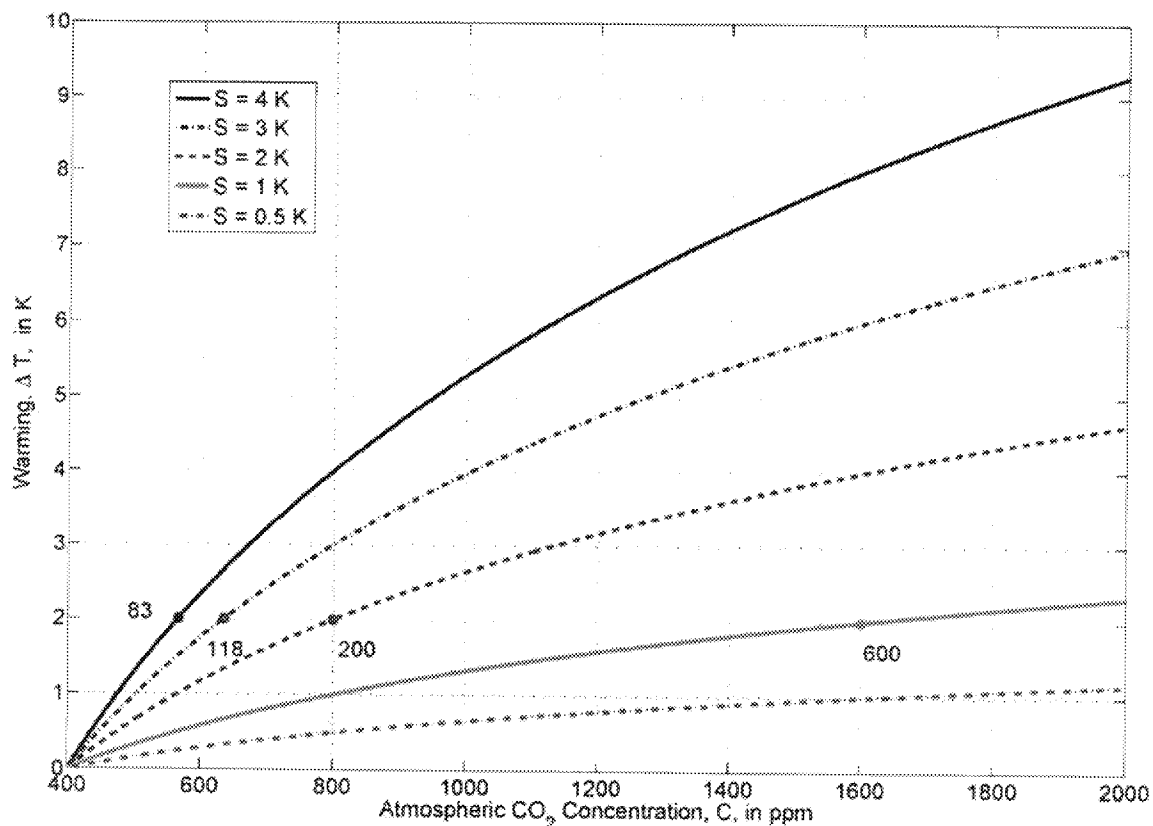
The logarithmic nature of ECS means each additional molecule of carbon dioxide released into the atmosphere traps heat less effectively than the previous molecule. In other words, as more carbon dioxide is emitted into the atmosphere, the rate at which the temperature rises will slow....”²⁴

Figure 4 below, from Princeton physicist William Happer, projects how long it would take to get 2 degrees C of warming for various doubling sensitivities with a logarithmic response.

Figure 5
Projections, Logarithmic Warming
In Response to Atmospheric Carbon Dioxide

²³ International Panel on Climate Change, “Climate Sensitivity and Feedbacks,” Fourth Assessment Report, 2007.

²⁴ Isaac Orr and Fred Palmer, “How Obama-Era Regulations Are Shutting Down Perfectly Good Power Plants,” *Policy Study* No. 146, The Heartland Institute, February 2018, p. 17.



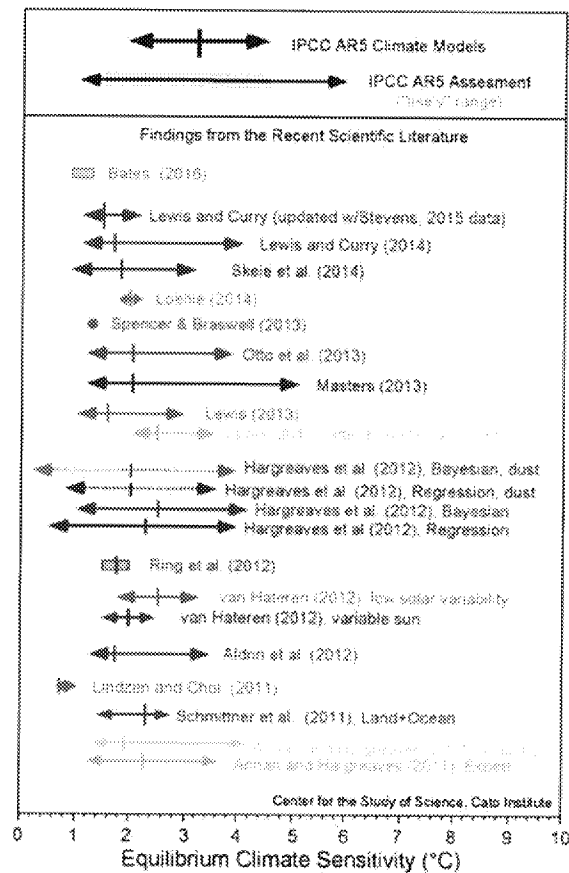
The impact of carbon dioxide on temperatures is logarithmic; meaning, as more carbon dioxide is emitted into the atmosphere (x-axis), it has less impact on temperatures (y-axis). This graph projects how many years it would take to get 2 degrees C of warming for various doubling sensitivities with a logarithmic response. Source: William Happer, Princeton University, private correspondence to the authors."

IPCC's 2007 AR-4 report assumes that for every doubling of atmospheric carbon dioxide concentrations, the world will experience a temperature increase between 2 and 4.5 degrees C, with their "best estimate" to be 3 degrees C. It is now widely agreed that this estimate is too high. A 2013 paper by Alexander Otto and colleagues—a group who previously led climate modeling for IPCC—concluded the likely range of temperature increase from a doubling of carbon dioxide would be between 1.2 and 3.9 degrees C, with their "best estimate" being 2 degrees C, a reduction of 33 percent compared to the values provided in AR-4 (see Figure 6). Alexander Otto, *et al.*, "Energy Budget Constraints on Climate Response," *Nature Geoscience*, May 19, 2013. Happer opines the best estimate would be 1 degree C. William Happer Interview, Focused Civil Dialogue on Global Warming, TheBestSchools.org (2019) <https://thebestschools.org/special/karoly-happer-dialogue-global-warming/william-happer-interview/>.

The Otto team's finding was published in IPCC's Fifth Assessment Report (AR-5) in 2013. The Endangerment Finding, which was based on AR-4, was not amended

to reflect this most up-to date science. This is an additional legally and scientifically sound basis for reopening, if not rescinding, the Endangerment Finding.

Figure 6
Model Ranges of Equilibrium Climate Sensitivity Estimates



Equilibrium climate sensitivity estimates of several studies show the values used by IPCC in its AR-4 and AR-5 assessments are likely too high, causing the models to run hot. Two notable distributions are the Otto *et al.* study (red), which puts the “best guess” at 2 degrees C, and the Lewis and Curry (updated w/Stevens 2015 data) study (dark blue), which shows a very small range of possible outcomes for a doubling of carbon dioxide, with a likely mean climate sensitivity of 1.4 degrees C. *Source:* Pat Michaels and Paul Knappenberger, “You Ought to Have a Look: Ontario’s Energy Plan, Evidence-Based Policy and a New Climate Sensitivity Estimate,” *Cato at Liberty* (blog), Cato Institute, May 25, 2016.

Even the lower values for ECS presented by Otto *et al.* are subject to uncertainty and could be further revised downward. For example, the estimates might reflect unrealistically high estimates of the cooling effects from sulfate aerosols.

Nathanael Massey, "IPCC Revises Climate Sensitivity," *Scientific American*, September 27, 2013.

Although sulfate aerosols come from natural sources such as phytoplankton and volcanoes, according to the IPCC AR4, International Panel on Climate Change, Climate Change 2007: Working Group I: The Physical Science Basis, 2.4.4.1 Sulphate Aerosol, they are largely the result of the combustion of fossil fuels. Regardless of their source, these particles are thought to cool the Earth. According to NASA:

The sulfate aerosols absorb no sunlight but they reflect it, thereby reducing the amount of sunlight reaching the Earth's surface. The sulfate aerosols also enter clouds where they cause the number of cloud droplets to increase but make the droplet sizes smaller. The net effect is to make the clouds reflect more sunlight than they would without the presence of the sulfate aerosols.²⁵

Recent studies of the impact of sulfate-aerosol cooling on global temperatures have found these particles have less cooling impact than estimated by IPCC. IPCC models had estimated sulfate aerosols will reduce temperatures between 0.1 and 1.4 degrees C. Bjorn Stevens, "Rethinking the Lower Bound on Aerosol Radiative Forcing," *Journal of Climate*, June 2015. The new studies find the likely cooling effect of sulfate aerosols to be between 0.2 and 0.8 degrees C, with additional studies suggesting the most likely cooling value to be 0.4 degrees C. This means the amount of cooling that is likely occurring from sulfate aerosols is approximately 3.5 times less than expected by IPCC.

This is an important finding because global temperatures have been essentially flat since 1998, even though approximately one-third of all human carbon dioxide emissions have occurred since that year. The lower cooling effects of sulfate aerosols plus more carbon dioxide in the atmosphere should have led to a large increase in global temperatures. That didn't happen. With the exception of 2015–2016, during which the planet experienced the warming of a record El Niño, global temperatures have been essentially flat. This strongly suggests IPCC is still overestimating the warming impact of carbon dioxide in the atmosphere.

If sulfate aerosols are not cooling the planet to "hide" carbon dioxide-induced global warming, and global temperatures have not been rising for nearly two

²⁵ National Aeronautics and Space Administration, "Atmospheric Aerosols: What Are They, and Why Are They So Important?"

decades despite large amounts of carbon dioxide being released into the atmosphere, then clearly carbon dioxide emissions result in less warming than predicted by IPCC computer models. Those models have predicted the planet would experience two or three times more global warming than has actually been observed by temperature satellites and weather balloons.

The importance of accurately determining how much global warming will occur from doubling carbon dioxide concentrations in the atmosphere cannot be overstated. If Earth's climate is less sensitive to increasing concentrations of carbon dioxide than IPCC says it is, efforts to prevent future global warming by radically reducing carbon dioxide will be both ineffective and expensive. Reducing the "best estimate" for ECS from IPCC's 2007 finding of 3 degrees C to the 1.4 degrees C found in more recent studies would effectively reduce the impact of reducing carbon dioxide emissions by one-half. Nic Lewis, "Updated Climate Sensitivity Estimates," *Climate Etc.* (blog), April 25, 2016.

Because these models, the basis of the Endangerment Finding, have been unable to accurately predict future temperatures, the Competitive Enterprise Institute has put forward a Petition for Reconsideration of the Endangerment Finding, noting:

A rulemaking proceeding is appropriate when new developments demonstrate that an existing rule or finding rests on erroneous factual premises, and a rulemaking petition is a proper vehicle for asking an agency "to reexamine" the "continuing vitality" of a rule.

Sam Kazman and Hans Bader, "Petition of the Competitive Enterprise Institute and the Science and Environmental Policy Project for Rulemaking on the Subject of Greenhouse Gases and Their Impact on Public Health and Welfare, in Connection with EPA's 2009 Endangerment Finding, 74 FR 66,496 (Dec. 15, 2009)," Competitive Enterprise Institute, February 23, 2017.

Based on that Petition, and this present one, and others already filed or on the way, EPA should reopen its Endangerment Finding for reconsideration.

- D. Based on the record of CO₂ surrogates, the Earth's concentration of CO₂ has been several times higher in geological history, with no record of any catastrophic results.**

Carbon Dioxide surrogates include deep ice core samples dredged up from glaciers and polar ice caps, and stalactites and stalagmites accumulating since time immemorial deep in caves. *Why Scientists Disagree About Global Warming* states, “At the current level of 400 parts per million, we still live in a CO₂-starved world. Atmospheric levels 15 times greater existed during the Cambrian Period (about 550 million years ago) without known adverse effects.”²⁶

That reference to CO₂ starvation refers to the role of atmospheric carbon dioxide in the survival of plants, which, of course, are at the foundation of the entire food pyramid. That CO₂ concentration had dipped below 300 parts per million before the Industrial Revolution and its vastly increased use of fossil fuels. The minimum for plant survival is estimated as somewhere near 200 to 250 parts per million. So the Industrial Revolution and fossil fuels may have saved mankind in more ways than the most obvious.

- E. Based on that same surrogate record, the historical pattern is for temperatures to rise first, and CO₂ to rise centuries later, which reverses the notion that increased CO₂ causes increased warming.**

The historical surrogate record for carbon dioxide shows that temperatures do not rise in response to rising carbon dioxide concentrations in the atmosphere. The record shows that temperature has risen first, and then hundreds of years later, atmospheric carbon dioxide concentrations have increased, which reverses the supposed cause and effect of hypothetical anthropogenic global warming.²⁷

As Idso and colleagues note,

Establishing the historic phase relationship between atmospheric carbon dioxide and temperature is a necessary step toward understanding the physical relationship between CO₂ forcing and climate change. When such analyses are conducted, changes in CO₂ are frequently seen to *lag* changes in temperature by several hundred years.²⁸

²⁶ Craig D. Idso et al., *Why Scientists Disagree About Global Warming: The NIPCC Report on Scientific Consensus* (Arlington Heights, Ill: The Heartland Institute, 2016), p. 3.

²⁷ Craig D. Idso et al., *Climate Change Reconsidered II, Physical Science*, Nongovernmental International Panel on Climate Change (NIPCC) (Arlington Heights, Ill: The Heartland Institute, 2013).

²⁸ *Id.*, p. 149

- F. The oceans are not rising any faster than they have since the end of the last ice age, polar ice caps and glaciers are not uniformly melting, and weather is not getting more extreme.**

The Executive Summary of the U.S. government's draft Climate Science Special Report (CSSR) (Page 26, line 8) reads: Global mean sea level (GMSL) has risen about 7-8 inches (about 16-21 cm) since 1900, with about 3 of those inches (about 7 cm) occurring since 1993 (very high confidence). Steven Koonin, "Critique of the Draft CSSR discussion of post-1900 Sea Level Rise," Oct. 10, 2017.

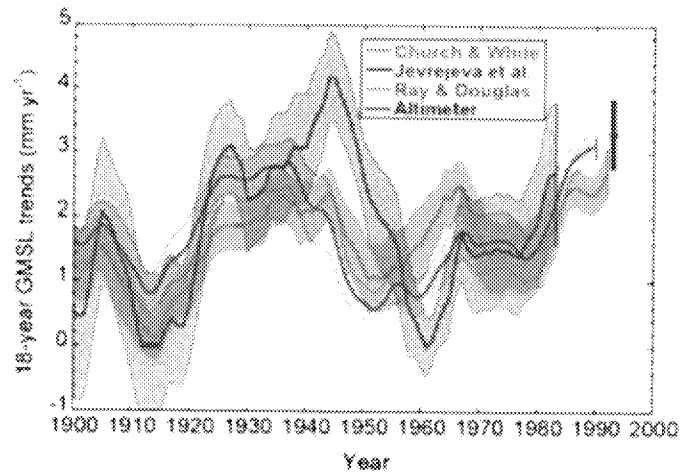
Steve Koonen, who served as Energy Department Undersecretary under President Obama, writes:

"In discussing global sea level rise since 1990, the draft of the Climate Science Report (CSSR) notes that the rate of rise since 1993 is significantly greater than the average rate of rise from 1900-1990, but fails to mention the substantial and well-established decadal fluctuations during the 20th century. In fact, the rates since 1993 are statistically indistinguishable from the rates in the first half of the 20th century."

Koonin, Id.

Considerable decadal scale fluctuations in sea level rise during the 20th Century are well established and discussed extensively in the literature, as Koonin notes. IPCC's Fifth Assessment Report (AR5) provided the figure below and notes it is likely that similar rates of global average sea level rise occurred between 1920 and 1950 as from 1993 to 2010. International Panel on Climate Change, *Climate Change 2013: The Physical Science Basis*, p. 289. (See Figure 7).

Figure 7
Sea Level Rise



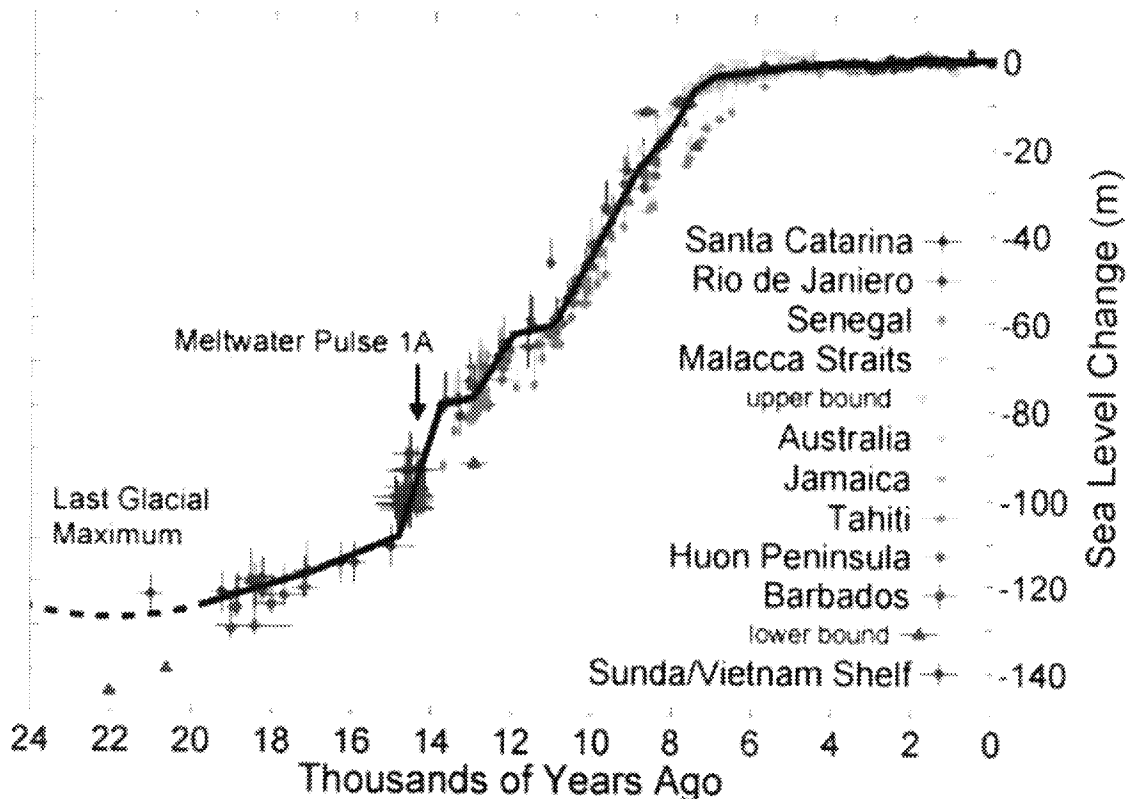
18-year trends of GMSL rise estimated at 1-year intervals. The time is the start date of the 18-year period, and the shading represents the 90% confidence. The estimate from satellite altimetry is also given, with the 90% confidence given as an error bar. Uncertainty is estimated by the variance of the residuals about the fit, and accounts for serial correlation in the residuals as quantified by the lag-1 autocorrelation. Data source: IPCC's Fifth Annual Report (2013), Working Group I, Figure 3.14

Figure 7 shows, in fact, that the most recent sea-level trends are not significantly different from what they were seven to nine decades ago, when Carbon Dioxide levels were 310 parts per million (ppm) or less, compared to Carbon Dioxide concentrations currently around 410 ppm today. As Ben Zycher of AEI explains, “the sea level has been oscillating about the same almost perfectly linear trend line all over the 20th century and the first 17 years of this century.” Ben Zycher, “The Union of Concerned Activists: Let the Lawsuits Begin!” AEI.org, November 2, 2017. Or in plainer terms, “Increases in sea levels have not accelerated over the last 117 years despite increases in [greenhouse gas] concentrations.” Id.

Indeed, despite claims about rapid sea level rise (SLR), oceans are not rising any faster than they have since the end of the last ice age approximately 20,000 years ago when sea level was approximately 130 meters lower than present levels (See Figure 7). Rud Istvan, “[Sea Level Rise, Acceleration and the Closure Problem.](#)” Climate Etc., July 20, 2016. In fact, as shown in the figure below, sea level rise has been much slower over the last 7,000 years than it has at any other time over the last 20,000 years.

Figure 8
Sea Level Rise Over Last 24,000 Years

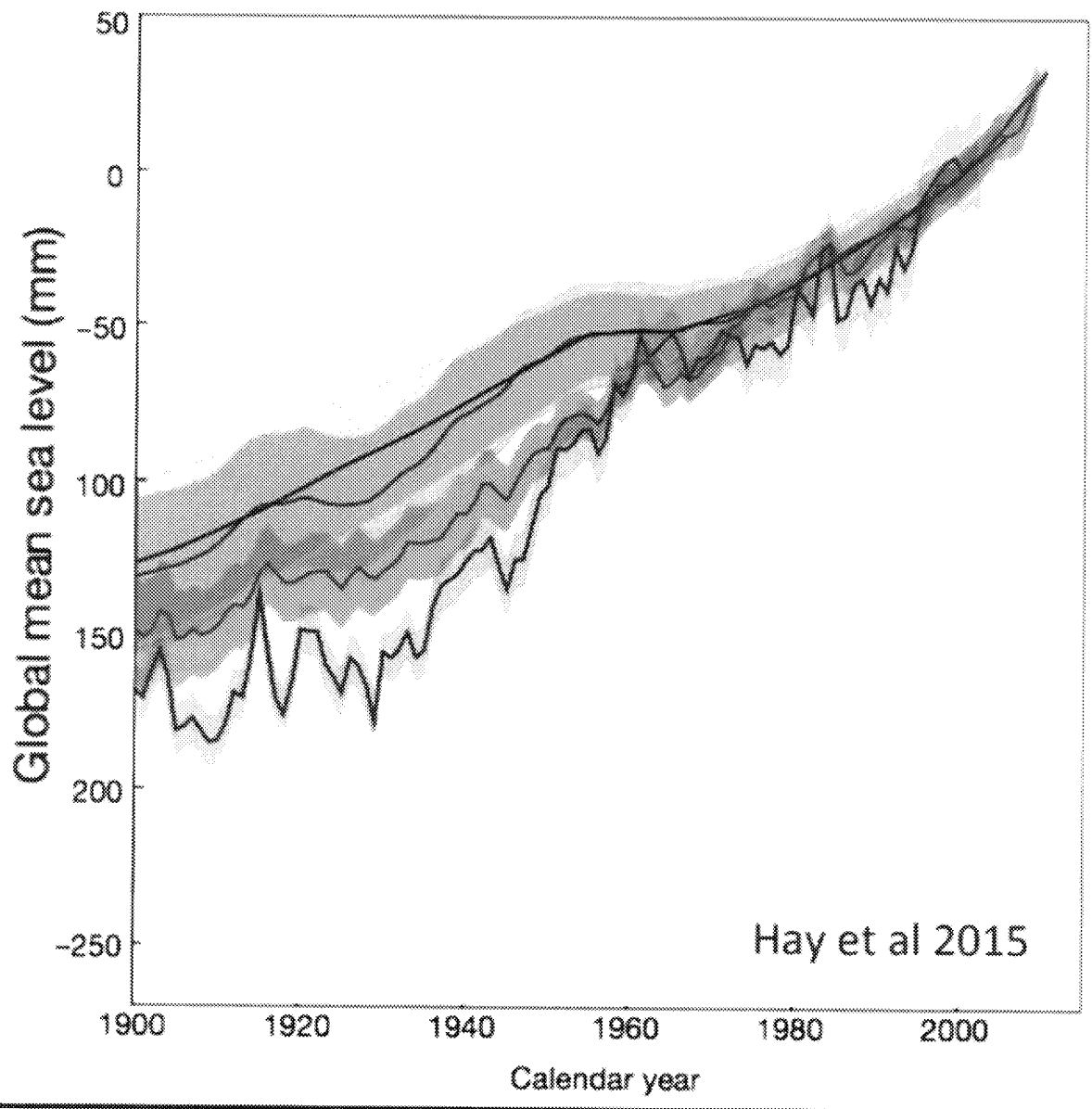
Global sea level rise – past 24,000 years



Sea level rise has been consistent on recent geologic timescales. Sea levels rose dramatically after the Laurentide Ice Sheet, a massive sheet of ice that covered much of North America, began to retreat approximately 20,000 years ago. *Source:* David Ullman, "The Retreat Chronology of the Laurentide Ice Sheet During the Last 10,000 Years and Implications for Deglacial Sea-Level Rise," University of Wisconsin Madison.

More recently, sea level has risen by approximately 8 inches since 1900, with a substantial portion of that rise between 1900 and 1950, when humans had emitted only one-tenth of the carbon dioxide into the atmosphere since the Industrial Revolution (See Figure 9). Carling Hay et al., "Probabilistic Reanalysis of Twentieth Century Sea-Level Rise," *Nature*, January 14, 2015.

Figure 9
Sea Level Rise Since 1900



Sea level has risen since 1900, but much of the rise in sea level pre-dated human-caused carbon dioxide emissions after 1950. This suggests natural variation also played a significant role in the sea level rise of the 20th century. Source: Carling Hay, *et al.*, "Probabilistic Reanalysis of Twentieth Century Sea-Level Rise," *Nature*, January 14, 2015.

Concerns about sea level rise are based on the potential for two major ice sheets, the Greenland Ice Sheet (GIS) and the Antarctic Ice Sheet (AIS), to melt, potentially causing large increases in sea level. The Greenland Ice Sheet covers

660,000 square miles, is more than a mile thick, and has a volume of 684,000 cubic miles. If this ice sheet were to melt completely, it would result in a 25 foot rise in sea levels.²⁹

However, historical evidence suggests fears of a rapid, catastrophic collapse of the Greenland Ice Sheet may be unfounded. During the Eemian period, the last interglacial period, sea level was approximately 6.6 meters higher than present levels. Global temperatures then were approximately 2°C higher than present, and Arctic summers were between 3° to 5°C higher, with some areas of Greenland experiencing temperatures 8°C higher than present.³⁰ These warmer temperatures persisted for a 6,000 year period between 122,000 and 128,000 years ago.

Despite the much-warmer arctic temperatures persisting for 6,000 years, the Greenland ice sheet only lost about 10 percent of its ice during the Eemian, though ice loss could have been as high as 30 percent in lower-elevation areas.³¹ Climate models project a future warming of 3°C over northwestern Greenland by around 2100. Based on ice-loss rates observed in the Eemian, it would take 12,000 summers to melt less than 30 percent of the ice mass in Greenland.³²

The Antarctic Ice Sheet (AIS) is split into two distinct ice sheets, the East Antarctic Ice Sheet (EAIS) and the West Antarctic Ice Sheet (WAIS). The EAIS is 10 times larger than the WAIS, and estimates are that it would raise sea level nearly 200 feet if it completely melted.³³

However, recent studies indicate that the EAIS would remain stable even if the smaller WAIS were to melt. Studies indicate the WAIS may be more susceptible to melting because the ice is grounded below sea level, and the largest volcanic region on Earth lies under the WAIS.³⁴

Sea levels not rising is consistent with the polar ice caps not melting. Steve Koonin noted in 2014 “the shrinking extent of Arctic sea ice observed over the past two

1. ²⁹ Andreas P. Ahlstrom et al., “Abrupt Shift in the Observed Runoff From the Southwestern Greenland Ice Sheet,” Science Advances, December 13, 2017.

³⁰ Audrey M. Yau et al., “Reconstructing the Last Interglacial at Summit, Greenland: Insights from GISP2,” Proceedings of the National Academy of Sciences, December 16, 2015.

³¹ Patrick Michaels and Chip Knappenberger, “Lukewarming: The New Climate Science that Changes Everything,” CATO Institute, 2016, p.204.

³² Ibid.

³³ Science Daily, “Study Validates East Antarctic Ice Sheet to Remain Stable Even if Western Ice Sheet Melts,” Science News, August 17, 2017.

³⁴ Maximillian van Wyk de Vries et al., “A new volcanic province: an inventory of subglacial volcanoes in West Antarctica,” Geological Society of London, May 29, 2017.

decades,” was more than offset by “the comparable growth of Antarctic sea ice, which is now at an all-time high.”³⁵ *Why Scientists Disagree About Global Warming* notes as well, “Melting of Arctic sea ice and polar ice caps is not occurring at ‘unnatural’ rates and does not constitute evidence of a human impact on climate.”³⁶

Moreover, weather is not getting more extreme, as has been repeatedly falsely hyped in recent years. Hurricanes, tornadoes, and droughts are following in line with the historical record, and the United States recently experienced a record 11-year period with no serious hurricanes making landfall (which ended before the serious hurricanes of 2018). Global weather patterns show no threat of ultimately catastrophic, anthropogenic, climate change.

As *Why Scientists Disagree About Global Warming* reports, “No convincing relationship has been established between warming over the past 100 years and increases in extreme weather events. Meteorological science suggests just the opposite: A warmer world will see milder weather patterns.”³⁷

Bottom line: The catastrophic global warming nightmare is not happening, and there is no evidence that is going to change in the future. The rate of sea level rise has been consistent since the end of the last ice age, and fears of a rapid, melting of the Greenland and Antarctic Ice Sheet due to human CO₂ emissions are not supported by historical ice core data. Polar ice caps and glaciers are not uniformly melting, and weather is not getting more extreme.

Of course, that is what should be expected with temperatures actually not rising any more over the past 20 years, and the pattern of temperature variation over the 20th century actually not outside the range of normal variability.

³⁵ Steven E. Koonin, “Climate Science Is Not Settled,” *The Wall Street Journal*, Sept. 9, 2014

³⁶ Idso et al., *Why Scientists Disagree About Global Warming: The NIPCC Report on Scientific Consensus*, *supra*, p. xxi.

³⁷ Idso et al., *Why Scientists Disagree About Global Warming: The NIPCC Report on Scientific Consensus*, *supra*, pp. xx-xxi.

IV. Fossil Fuels Are Essential to American Prosperity and the American Dream

A. Worldwide, and for hundreds of years since the Industrial Revolution, fossil fuel use is associated with higher economic growth, GDP, incomes, wages, health, life expectancy, population, and reduced poverty.

In their book, *Fueling Freedom: Exposing The Mad War on Energy*³⁸, Stephen Moore and Kathleen Hartnett White explain the economics of energy. They write,

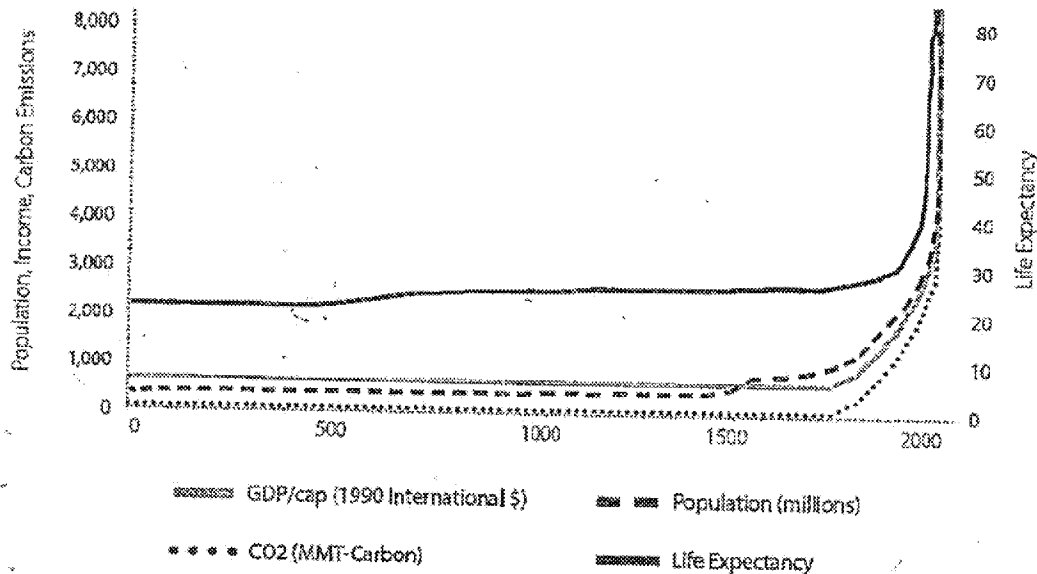
“Our book begins by recognizing the “Great Fact” of human progress. Something monumental happened around 1800, something that had never happened before. For millennia, the average human life was short and lived at subsistence level. The growth of the human population was slower than a crawl. But in the nineteenth century, there began a substantial and sustained improvement in the fundamental measures of human well-being.”³⁹

What happened was the Industrial Revolution. They illustrate the impact in Figure 10, Global Progress, 1 AD—2009 AD.

³⁸ Stephen Moore and Kathleen Hartnett White, *Fueling Freedom: Exposing the Mad War on Energy* (Washington, DC: Regnery Publishing 2016).

³⁹ *Id.*, p. 2.

Figure 10
Global Progress, 1 AD—2009 AD.



Sources: Updated from Indur Goklany, "Have Increases in Population, Affluence and Technology Worsened Human and Environmental Well-being?" *Electronic Journal of Sustainable Development* 1, no. 3 (2009); based on Bruce W. Frier (2001), "More is worse: some observations on the population of the Roman empire", in Walter Scheidel, *Debating Roman Demography*, URL = <https://books.google.com/books?id=vh3pmAodawEC&pg=PA144#v=onepage&q&f=false>; Angus Maddison, *Statistics on World Population, GDP and Per Capita GDP, 1-2008 AD*, University of Groningen, 2010, http://www.gedc.net/MADDISON/Historical_Statistics/vertical-file_02-2010.xls; World Bank, *World Development Indicators 2015*, <http://databank.worldbank.org/>; T.A. Boden, R. J. Andres, *Global CO2 Emissions from Fossil-Fuel Burning, Cement Manufacture, and Gas Flaring, 1751-2011*, at http://cdiac.ornl.gov/ftp/ndp030/global.1751_2011.ems, visited December 15, 2015; CDIAC, *Preliminary 2011 and 2012 Global & National Estimates*, at http://cdiac.ornl.gov/ftp/trends/co2_emis/Preliminary_CO2_emissions_2012.xlsx, visited February 2, 2016. Notes: Data are sporadic until 1960. This figure assumes that trends between adjacent data points are linear. Life expectancy is a surrogate for human well-being; living standards are depicted by affluence, or GDP per capita; and CO2 is a proxy for fossil-fuel usage.

Figure 10 "charts four basic measures of human welfare over the past two thousand years—life expectancy, real income per capita, population, and energy consumption."⁴⁰ Emissions of carbon dioxide resulting from human activity are used in the chart as a surrogate for consumption of energy derived from fossil fuels. The figure shows all four almost flat for almost the entire 2000 years, until 1800, when all four start shooting almost straight up together, which designates the arrival of the modern world.⁴¹

The authors explain,

⁴⁰ Id., p. 5.

⁴¹ Id.

“The almost vertical trajectory of our graph that begins around 1800 coincides with the beginning of the English Industrial Revolution....an energy enrichment that spawned phenomenal economic productivity and dramatic improvements in human living conditions. What textbooks call the Industrial Revolution might be better described as mankind’s Great Energy Enrichment.”⁴²

The authors quote historian Carlo Cibolla explaining, “the Industrial Revolution can be defined as the process by which a society acquired control over vast sources of inanimate energy.”⁴³ Moore and White add, “Those sources were fossil fuels, first coal in England, soon followed by natural gas, and then crude oil in the twentieth century.”⁴⁴

Moore and White add further,

“few people appreciate that this spectacular improvement in the human condition is really a story of the fossil fuels revolution. The world moved away from inefficient and limited ‘green’ energy like the medieval windmill to coal and other modern forms of energy that could be adopted on an industrial scale. Fossil fuels were a necessary condition of the Industrial Revolution’s unprecedented improvements.”⁴⁵

The authors elaborate, “Is it not startling that most of humanity had been stuck with a real average income of \$1 to \$7 per day until the past two centuries?”⁴⁶ They explain, “Average real income per capita—on a global basis—is now ten to twenty times higher than at the beginning of the industrial revolution.”⁴⁷

The authors further explain the implications for economic growth.

“The same graph also depicts the unprecedented economic growth driven by industrialization. The economic historian Deirdre McCloskey puts it in perspective: ‘The scientific fact established over the past 50 years by the labors of economists and economic historians is that modern economic growth has been astounding, unprecedented, unexpected, the greatest surprise in economic history.’ Economic growth and increased energy

⁴² Id., pp. 4-5.

⁴³ Id., p. 5.

⁴⁴ Id.

⁴⁵ Id., pp. 2-4.

⁴⁶ Id., p. 4.

⁴⁷ Id., p. 5.

consumption were tightly connected over the past century. In 2000, the correlation between energy consumption and income per capita across sixty-three countries was an extremely close 96 percent.”⁴⁸

Both energy consumption and gross world product increased 16 fold in the 100 years of the 20th century.⁴⁹ “The rise of gross world product from \$2 trillion to \$32 trillion within a century is nothing less than astonishing,”⁵⁰ Moore and White note.

A similar explosion resulted in population. Moore and White again explain, “In our graph of human progress, population barely increases over the first millennium A.D. Between the years 1000 and 1750, the global population increases substantially, tripling to 760 million. But from 1750 to 2009, population rises eightfold, to almost 7 billion human beings—a decisive departure from all previous epochs.”⁵¹

Moore and White add,

“Never before has mankind been better nourished. As we shall show, you can thank fossil fuels for a global food supply that exceeds the demand of more than seven billion mouths....In America, we produce three times as much food as we did a century ago, in one-third fewer manhours, on one-third fewer acres, and at one-third the cost. In the past, more than half of Americans were employed in agriculture, and food was still relatively scarce and expensive. Now about 3 percent of the population produces all the food that 300 million Americans consume. We even have to often pay farmers to stop growing so much food.”⁵²

With the increased fossil fuel use of the Industrial Revolution came increased carbon dioxide emissions. Moore and White note, “Before the Industrial Revolution, man-made emissions of carbon dioxide were marginal. The United States now uses about two hundred times more energy than in 1800, and almost all of it comes from fossil fuels.”⁵³

Fossil fuels are consequently essential for economic growth, the prosperity of the American people, and the survival of the American Dream, especially for working

⁴⁸ Id., pp. 6-7.

⁴⁹ Id., p. 7

⁵⁰ Id.

⁵¹ Id. p. 6.

⁵² Id.

⁵³ Id., p. 4

people, blue collar workers, and the middle class. They are also essential to sharply reducing, and ultimately eliminating poverty in America entirely.

B. Even after decades of government subsidy and favoritism, alternative energy such as solar and wind play only a niche role in U.S. energy supplies.

In sharp contrast, Moore and White discuss alternative, renewable energy,

“For many centuries mankind relied on what is now called ‘renewable energy’ – windmills, wood, water, and the sun. The notion that green energy is ‘in its infancy’ is laughable. These sources of energy go back thousands of years. And the data recently gathered by economic historians...show that wind and water wheels never provided much power. It wasn’t until man harnessed fossil fuels—primarily oil, gas and coal—that industrialization achieved unprecedented productivity.”⁵⁴

Christopher Horner of the Competitive Enterprise Institute adds, “[Y]ou can build windmills with steel, but you can’t build steel with windmills.”⁵⁵ Moore and White elaborate, “The great steel works of Pittsburgh could not have built America’s industrial framework if their power had come from windmills. Detroit’s automobiles could not have replaced horses (and horse manure) if they had run on solar power.”⁵⁶

Moore and White summarize,

“With this book, we aim to document and explain the extent to which fossil fuels have vastly improved human life across the planet, releasing whole populations from abject poverty. Virtually everything needed to sustain the life of a human being—food, heat, clothing, shelter—depends upon access to and conversion of energy. The productivity fueled by hydrocarbon energy sources, coupled with economic freedom, allowed the emergence of an enduring middle class for the first time in history.”⁵⁷

Moore and White conclude,

⁵⁴ Stephen Moore and Kathleen Hartnett White, *Fueling Freedom: Exposing the Mad War on Energy*, supra, p. xiv.

⁵⁵ Id., p. xiv.

⁵⁶ Id.

⁵⁷ Id.

“Today, hundreds of years after the Industrial Revolution began, most of the human population is dependent on fossil fuels for 80 to 90 percent of its energy supply. That will surely be the case at least for many decades. The long-held superstition that America is running out of oil and gas has been disproved with the latest shale oil and gas revolution.”⁵⁸

Yet, despite the obvious dominance of and continued need for fossil fuels, wind and solar receive more subsidies than any other source of energy, both in absolute terms and on a per-unit-of-energy-generated basis.⁵⁹

In 2013, wind received more subsidies than any other energy source at \$5.9 billion (see Figure 11). Solar was the second largest with \$5.3 billion. By contrast, nuclear energy received \$1.66 billion, coal received \$1.07 billion, and oil and natural gas received \$2.35 billion.⁶⁰ In recent years, federal renewable energy subsidies have totaled *more than three times the subsidies paid for all fossil fuels and nuclear energy combined*.⁶¹

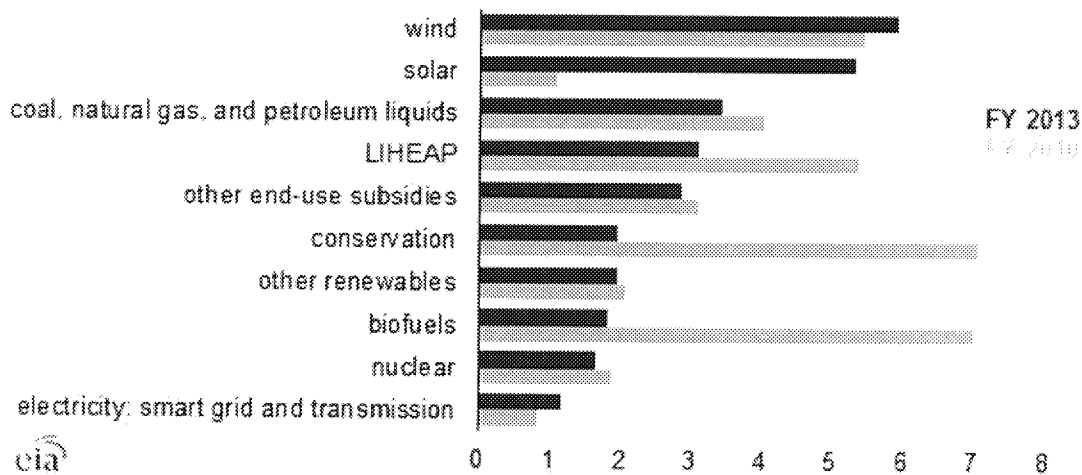
⁵⁸ *Id.*

⁵⁹ U.S. Energy Information Administration, “Direct Federal Financial Interventions and Subsidies in Energy in Fiscal Year 2013,” *Analysis and Projections*, March 23, 2015.

⁶⁰ U.S. Energy Information Administration, “Total Energy Subsidies Decline Since 2010, With Changes in Support Across Fuel Types,” *Today in Energy* (website), March 13, 2015.

⁶¹ Management Information Services, Inc. *Two Thirds of a Century and \$1 Trillion+: U.S. Energy Incentives Analysis of Federal Expenditures for Energy Development, 1950–2016*, prepared for the Nuclear Energy Institute, May 2017.

Figure 11
Quantified Energy-Specific Subsidies and Support by Type
Fiscal Years 2010 and 2013
(in billions of 2013 dollars)

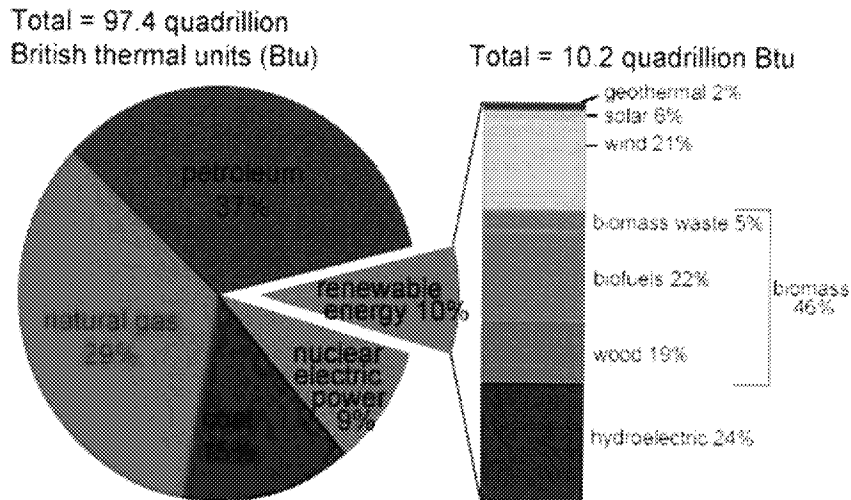


Government subsidies supporting wind and solar combined for \$11.2 billion in 2013, while coal received \$1.07 billion. LIHEAP is the Low Income Home Energy Assistance Program, which helps families pay their energy bills. Spending on that program increased by nearly 50% in just three years from 2010 to 2013. *Source:* U.S. Energy Information Administration, “[Total Energy Subsidies Decline Since 2010, With Changes in Support Across Fuel Types](#),” *Today in Energy* (website), March 13, 2015.

Despite the fact that renewable energy sources are the most highly-subsidized forms of energy, they accounted for only 2.7 percent of the total energy consumed in the United States in 2016. In contrast, oil provided 37 percent, natural gas 29 percent, coal 15 percent and nuclear energy 9 percent of total energy consumption (See Figure 12).

Figure 12

U.S. energy consumption by energy source, 2016



Note: Sum of components may not equal 100% because of independent rounding

Source: U.S. Energy Information Administration, *Monthly Energy Review*, Table 1.3 and 10.1, April 2017, preliminary data

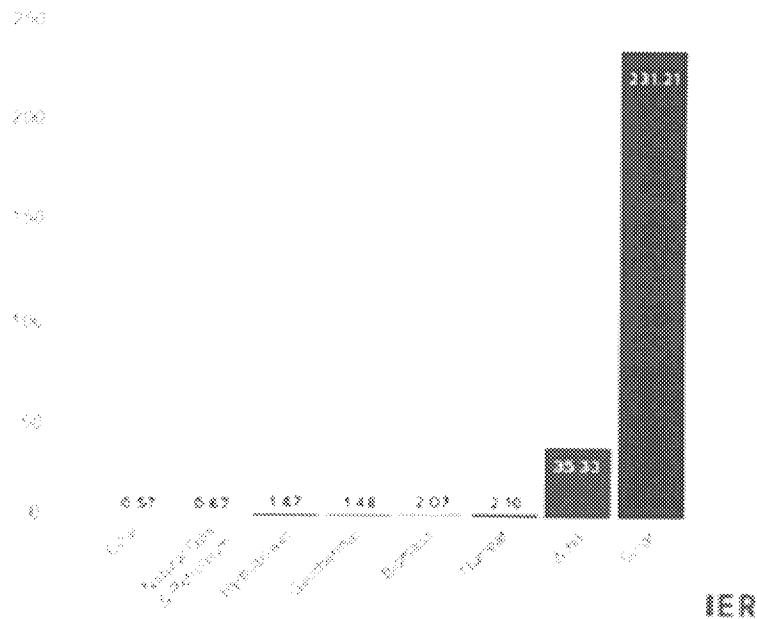


Wind and solar power are the most heavily subsidized forms of energy, yet they provide almost no energy in terms of total energy consumption. Combined, these two forms of energy provide less than 3 percent of energy use in the United States.

Subsidies to wind and solar are large in absolute terms and even larger when considered per unit of energy produced. In these terms, wind received \$35.33 per MWh and solar received \$231.21/MWh, while coal received only \$0.57/MWh and natural gas and petroleum received only \$0.67/MWh. Wind and solar consequently received 52 times and 345 times more in subsidies than coal, respectively (see Figure 13).⁶²

⁶² Institute for Energy Research, "EIA Report: Subsidies Continue to Roll In For Wind and Solar," March 18, 2015.

Figure 13
Federal Electric Subsidies
Per Unit of Production, FY 2013
 (2013 dollars per megawatt hour)



Federal subsidies for wind and solar grew dramatically from 2010 to 2013. On a per unit of energy basis, wind and solar received 52 times and 345 times more subsidies than coal, respectively. *Source:* Institute for Energy Research, “EIA Report: Subsidies Continue to Roll In For Wind and Solar,” March 18, 2015.

Recent data suggest very few wind power facilities would be built without the federal wind PTC (see Figure 14). Without federal, state, and local government subsidies and mandates, the renewable energy industry would not survive in the United States. As Warren Buffet, CEO of Berkshire Hathaway, and “one of the most successful investors of all time,”⁶³ stated, “We get a tax credit if we build a lot of wind farms. That’s the only reason to build them. They don’t make sense without the tax credit.”⁶⁴

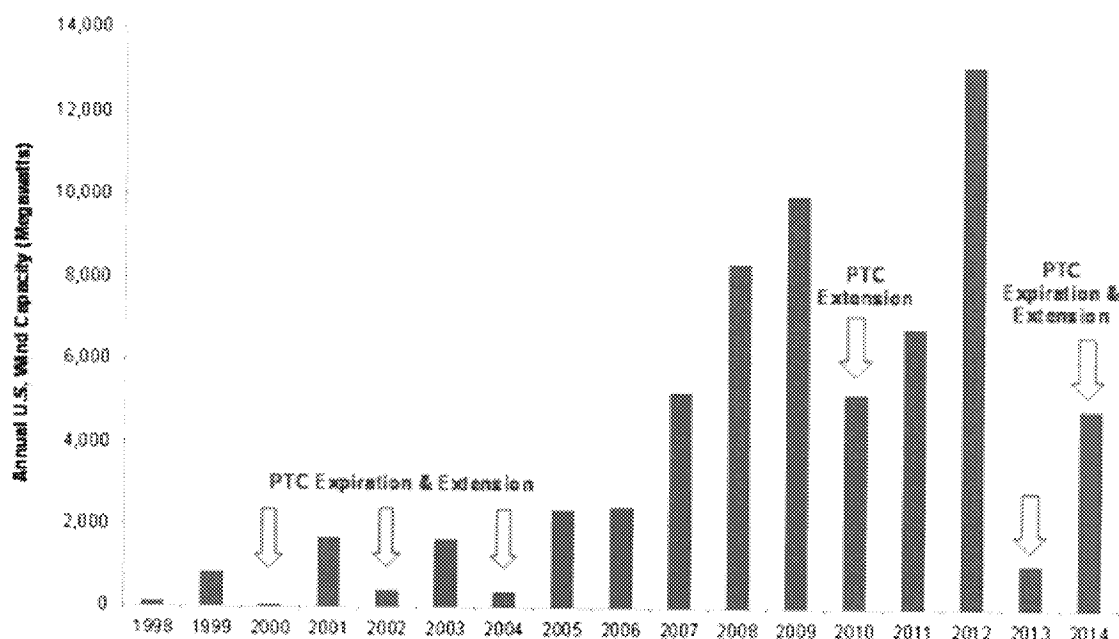
Federal subsidies distort wholesale power markets by artificially increasing the amount of wind and solar generation on the grid. Although wind and solar receive more subsidies in absolute terms and on a per-unit-of-energy basis than any other

⁶³ Profile: Warren Buffet, *Forbes* (website), accessed November 28, 2017.

⁶⁴ Grant Kidwell, “Iowa Wind Farm Generates More Tax Credits than Electricity,” *The Hill*, October 6, 2016.

source of energy, they account for just 6.5 percent of electricity generation. It is difficult to argue this money has been well spent.

Figure 14
Impact of Production Tax Credit Expiration and Extension
On U.S. Annual Installed Wind Capacity



In the years following expiration of the wind PTC, wind power installations dropped between 76 and 93 percent, suggesting wind installations are not competitive without federal subsidies. *Source:* Union of Concerned Scientists, "Production Tax Credit for Renewable Energy" (website), accessed September 27, 2017.

Discussing the subsidies and total energy contributions of renewables only tells part of the story. Even in states where large portions of electricity are derived from renewable energy sources like California, which mandates 50 percent of the state's energy must come from renewables by 2030, natural gas fired power plants must be ready to provide electricity because renewable energy sources like wind and solar are intermittent (the wind does not always blow, and the sun does not always shine – see, e.g., night time). The need to maintain and continue fossil fuel energy production as a backup is a primary reason why renewables cost so much more

than fossil fuels.⁶⁵ In other words, alternative energy is not truly an alternative to fossil fuels.

Germany is an ideal example of the folly of a nation that tried to switch from fossil fuels to renewables, with full support of the government. Businesses and households in Germany paid an extra 125 billion euros in increased electricity bills from 2000 to 2015 to subsidize renewables.⁶⁶ As a result, “Germans join Danes in paying the highest household electricity rates in Europe, and German companies pay near the top among industrial users.”⁶⁷ Indeed, German households pay 3 times the costs for electricity that American households pay.⁶⁸ Yet, despite all of that economically crippling cost burden, only one-third of German electricity comes from renewables today, compared to still 40% for coal.⁶⁹

Fundamental laws of physics explain why fossil fuels are so much more effective and less expensive than renewables. The energy in fossil fuels is so much more concentrated than in renewables. The energy blowing in the wind, or dancing on sunbeams, is highly disparate. So collecting it in usable form is inherently difficult, challenging and expensive.

The mandates of the old Clean Power Plan (CPP) that states build more renewable generation would do nothing but decrease the reliability and affordability of electricity while still requiring that reliable coal or natural gas power plants be available to supply power when intermittent generation sources are not delivering electricity. That would mean much higher electricity costs, which translates into slower economic growth, reduced prosperity, and increased poverty in America. Niche renewables could never power the modern, 21st Century, American economy. The American economy could not remain viable, let alone prosperous, with its energy industries surviving only as “welfare queens.”

⁶⁵ As Bernie Peiser at the Global Warming Policy Foundation explains, “(Every 10 new units worth of wind power installation has to be backed up with some eight units worth of fossil fuel generation. That is because fossil fuel units have to power up suddenly to meet the deficiencies of intermittent renewables. In short, renewables do not provide an escape route from fossil fuel use, without which [the renewables] are unsustainable....To avoid blackouts [with renewables], the government has to subsidize uneconomic [because part-time backup] gas and coal power plants.” <http://www.thegwpf.com/benny-peiser-eus-green-energy-debacle-shows-the-futility-of-unilateral-climate-policies/>: (April 4, 2015).

⁶⁶ “Germany’s Green Energy Meltdown,” *The Wall Street Journal*, Saturday/Sunday November 18-19, 2017, p.

A12.

⁶⁷ Id.

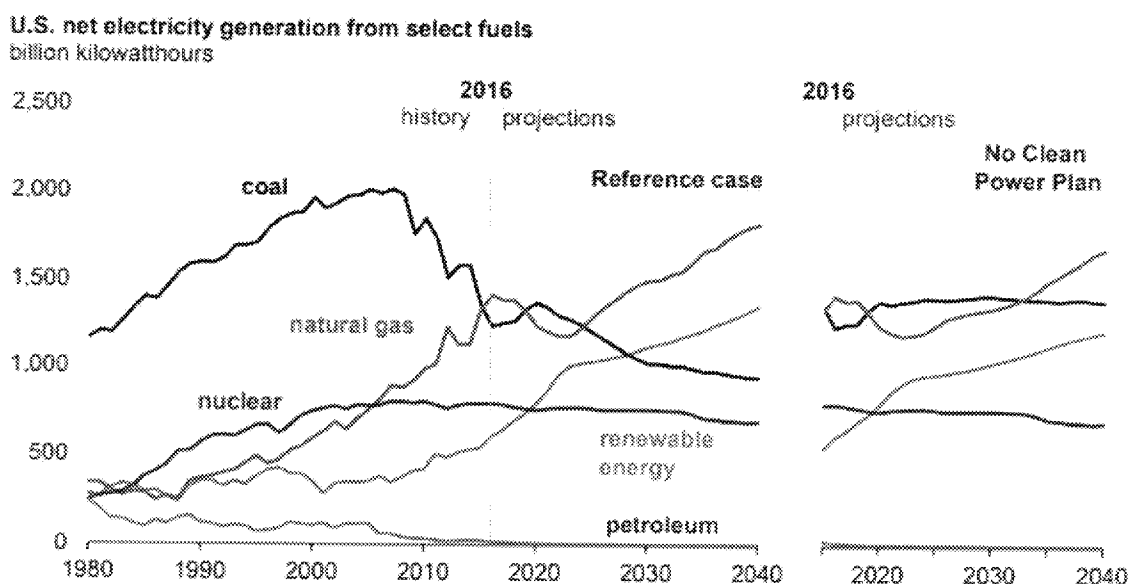
⁶⁸ Id.

⁶⁹ Id.

C. Official U.S. government projections show this will be true for the foreseeable future, for decades (50 to the next 100 years at least).

According to the United States Energy Information Administration, fossil fuels will still be the most important energy sources in the coming decades for the United States, and globally. Fossil fuels will remain the dominant fuel sources under every economic scenario, even those incorporating the Clean Power Plan into their analysis. Under the no-CPP scenario, natural gas and coal will be the dominant fuel sources for electricity generation, with gains in renewable generation driven primarily by federal tax subsidies (See Figure 15).

Figure 15

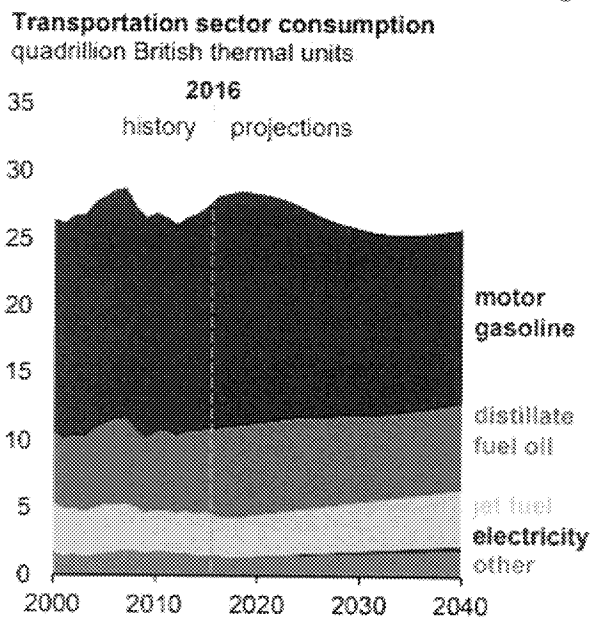


According to the EIA's Annual Energy Outlook, growth in renewable energy sources will depend heavily upon the tax credits available to them because these sources of energy are not competitive without them. This makes it more likely that renewables will account for an even smaller share than either of the scenarios above predict.

Additionally, the transportation sector, which accounted for 29 percent of the nation's energy consumption in 2016, will continue to rely almost exclusively on oil-based fuels for the coming decades, with electric cars constituting a tiny fraction of the American automobile fleet.⁷⁰

⁷⁰ U.S. Energy Information Administration, "Energy Use for Transportation," Energy Explained, May 17, 2017.

Figure 16



Globally, EIA projects that world energy consumption will grow by 28 percent between 2015 and 2040, with most of this growth occurring in developing nations, primarily in Asia. EIA projects fossil fuels will account for 77 percent of total energy use in 2040.⁷¹

Liquid fuels—mostly petroleum-based—are predicted to remain the largest source of world energy consumption, accounting for 31 percent of global energy production in 2040. Natural gas is projected to account for 24 percent of energy use, and EIA estimates that coal will count for 22 percent of total world energy consumption in 2040.

However, these projections, particularly those regarding coal usage, may be unrealistic, as China and India have continued to aggressively build coal-fired power plants to meet their growing electricity needs. For example, Chinese companies are building or planning to build more than 700 new coal-fired power plants over the next decade.⁷² Most of those plants will be built in China, but about one-fifth will be built in other countries. All told, some 1,600 coal plants are planned or under construction in 62 countries worldwide.⁷³ Coal will continue to be the main source of energy for China for decades to come.

⁷¹ U.S. Energy Information Administration, “[International Energy Outlook 2017](#),” Executive Summary, September 14, 2017.

Similarly, India's reliance on coal will persist even in 2047 with an envisaged share of 42%-50% in the energy mix. India would like to use its abundant coal reserves as they provide a cheap source of energy and ensure energy security as well. However, imports of coal have risen at a CAGR of 18% from 2005-06 (39 MT) to 2015-16 (200 MT). The modeling exercise of NITI shows that India will achieve peak production of coal in 2037, after which production will decline and India will need imports to meet its requirements (See Figure 17).

Figure 17

Energy Mix of India:

	2012	2047	
TWh		BAU Scenario	Ambitious Scenario
Nuclear	1%	2%	4%
Renewable Energy	3%	7%	12%
Agriculture/waste	15%	5%	8%
Coal	46%	50%	42%
Oil	27%	28%	23%
Natural gas	8%	8%	10%

Coal will remain the dominant fuel in India for the next 30 years, as the business as usual scenario indicated India will derive 50 percent of its energy from coal and only 7 percent from renewable sources.⁷²

Renewables, by contrast, are still projected to account for less than 22 percent of total energy consumption worldwide, despite the billions if not trillions of dollars in subsidies that have been provided to these technologies on a global scale. In addition to accounting for a small overall share of global energy generation, the majority of renewables, 53 percent, will be derived from hydroelectric generating sources, not wind or solar.

The United States should acknowledge the physical and economic limits of renewable energy sources such as wind and solar and decriminalize affordable, reliable energy in the form of allowing existing coal-fired power plants, and High Efficiency Low Emissions (HELE) power plants to shoulder significant loads for electricity generation now, and decades into the future.⁷³

⁷² Harendra Kumar et al., "Energizing India," Joint Project Report of NITI Aayog and IEEJ, June 16, 2017 http://niti.gov.in/writereaddata/files/document_publication/Energy%20Booklet.pdf.

⁷³ U.S. Energy Information Administration, "International Energy Outlook 2017," September 14, 2017.

Niche renewables like wind and solar will never be able to power the modern, 21st century global economy. Renewables are not the future. Renewables are inherently limited in their reach by fundamental laws of physics. There are fundamental reasons why the industrial revolution, economic growth and modern prosperity took off when fossil fuels became widely utilized through technological innovation. We are not going to be able to power the modern, global economy of the 21st century with the energy sources of the Roman Empire.

D. Phasing out fossil fuels would amount to a policy of mass poverty for the American people, unless America turns to nuclear power on a crash course, which is opposed by the same hysterical extremists who oppose fossil fuels.

Reversing the fossil fuel revolution to go back to renewables is not going to be a happy time for America, or for the human race globally. Moore and White explain,

“The governments of many of the most developed countries of the world have

mandated as rapid a transition as possible from carbon-rich energy to zero-carbon energy like wind, solar, and biomass. The inherent limitations of wind and solar are physically intractable. We are facing a regression to the limited energy horizons of pre-industrial societies. Never before have the rulers of a society intentionally driven it backward to scarcer, more expensive, and less efficient energy...and raise[d] prices for financially strapped families.”⁷⁴

Michael Kelly, a Fellow of the Royal Society of the United Kingdom, adds, “A decarbonized global economy is going to have to outperform the achievement of fossil fuels. If not, mankind’s progress will have to go in reverse in terms of aggregate standard of living. We should be honest and upfront about the sheer scale and enormity of the challenge implied by decarbonization.”

Moore and White elaborate that those who benefitted the most from the booming economic growth of the Industrial Revolution were the poorest, forgotten at the bottom of pre-enlightenment, pre-industrial, medieval times. They write,

“Those who have gained the most from that growth have not been the wealthiest but the poorest. With the Industrial Revolution,...[f]or the first

⁷⁴ Stephen Moore and Kathleen Hartnett White, *Fueling Freedom: Exposing the Mad War on Energy*, supra, p. xv.

time the economy performed for the People instead of mainly for the Privileged.’ From the beginning, it was not the aristocracy, clerisy, warrior class, or industrial titans who gained the most, but the average worker and the most impoverished. No longer was intractable poverty the common lot of mankind. An enduring middle class emerged. The historian Robert Fogel concludes that “the average real income of the bottom fifth of the [American] population has multiplied some twenty-fold [over the twentieth century], several times more than the gain realized by the rest of the population.”⁷⁵

To illustrate that more concretely, Moore and White offer this example: “In 1875, the average American family spent 74 percent of its income on food, clothing and shelter, not unlike the rest of the world. In 1995, the same American family spent 13 percent of its income on these fundamental necessities.”⁷⁶

If Kelly is right, and we are going to have to go in reverse in terms of aggregate standard of living, what does that mean for working people, the middle class, and the poor? Moore and White explain,

“Most green policies undermine human progress. They are regressive, disproportionately hurting low and middle income families by driving energy prices higher, thus eroding their standard of living. As the Obama Administration was drawing to a close, the lower end of middle class income in the United States appeared to be sliding toward the poverty level. Numbers revealed by the Social Security Administration in the fall of 2015 show that 51 percent of all U.S. workers were making less than \$30,000 a year—only \$2,500 a month after taxes. Income for middle class families declined by 3 percent on Obama’s watch, and the average worker went ten years without a raise.”⁷⁷

Moore and White directly implicate the Clean Power Plan in that regard,

“The [CPP] is futile—all pain and no gain. By EPA’s own admission, the mandated carbon cuts will not meaningfully reduce predicted warming. Gina McCarthy, the Administrator of the EPA, justifies it as a gesture of sacrifice by the wealthiest country in the world. Americans should embrace economic decline for its symbolic value? Even before the Clean Power Plan took

⁷⁵ Id., pp. 7- 8.

⁷⁶ Id., p. 8.

⁷⁷ Id., pp. 8-9.

effect, many coal fired power plants had closed and major power companies had declared bankruptcy, at a cost of thousands of jobs. In response, President Obama, by executive action, froze coal production on federal lands, where 40 percent of total U.S. production is located. The Left's strategy is to make American coal so expensive that the industry cannot survive in global markets. The environmentalists want an utterly debilitating 'production tax' of as much as \$40 per ton...Obama [chose] 'to pander to special interest groups whose stated goal is to shut down the U.S. coal industry'—and the economies of our coal producing states—Illinois, Ohio, Kentucky, Pennsylvania, West Virginia, Wyoming and West Virginia—be damned."⁷⁸

That list of coal producing states seems to include the former Democrat states that flipped to Trump in the last election, and put him in the White House. Moore and White conclude,

"President Obama and some leaders of the wealthiest countries in the world are adamant about phasing out fossil fuels when there are no *alternative energy sources* capable of providing the countless goods and services that fossil fuels make possible. Modern societies remain utterly dependent on fossil fuels...The climate crusade is indeed a mad war on human welfare."⁷⁹

Even worse, eliminating fossil fuels will not only raise prices for energy, goods, and services for poor and middle-class families, making them increasingly poor and marginalized. Eliminating fossil fuels will greatly increase energy prices for factories and other businesses, including hospitals and schools, destroying millions of jobs for those very same blue-collar families, and driving more and more people onto welfare rolls. At the same time, local, state, and federal governments will have less and less tax revenue to pay for welfare, because the entire U.S. economy will be driven into a downward death spiral. Millions of American families will see their living standards, health, welfare, and life spans decline precipitously, for no climate or environmental benefit whatsoever.

As Bjorn Lomborg noted in January 2018 for *The Wall Street Journal*,⁸⁰

⁷⁸ Id., p. 9.

⁷⁹ Id., p. 10.

⁸⁰ Bjorn Lomborg, "Climate-Change Policies Can Be Punishing for the Poor," *The Wall Street Journal*, January 5, 2018.

Freezing temperatures in the U.S. Northeast have pushed up heating costs, creating serious stress for many Americans. Although the rich world's energy poor are largely forgotten in discussions about climate policies, they bear an unfair burden for well-meaning proposals. That reality is being laid bare this icy winter as energy and electricity prices surge.

When we think about energy poverty, we imagine a lack of light in the world's worst-off nations, where more than one billion people still lack electricity. This is a huge challenge that the world can hope to address as it reduces poverty and expands access to grid electricity, largely powered by fossil fuels.

But there is a less visible form of energy poverty that affects even the world's richest country. Economists consider households energy poor if they spend 10% of their income to cover energy costs. A recent report from the International Energy Agency shows that more than 30 million Americans live in households that are energy poor—a number that is significantly increased by climate policies that require Americans to consume expensive green energy from subsidized solar panels and wind turbines.

Moore and White contrast the fundamental economic choice this frames — Economic Growth or Decline:

“The contrast between these two forces is stark and simple. The shale energy boom increased the economic pie. Taxpayer subsidized green energy shrinks the economic pie. The kind of economic growth we take for granted in the modern world would have been impossible if we had been limited to sources of energy that depend on taxpayer subsidies. Climate policies to decarbonize human society augur energy scarcity, exponentially higher prices for basic goods, loss of personal freedoms, and an end to the prosperity achieved in the twentieth century that has lifted billions out of grinding poverty.”⁸¹

V. Continued use of fossil fuels will produce an American economic boom, creating millions of new jobs and restoring rising real wages for the middle class and blue collar workers.

A. America now has the natural resources to be the world's no. 1 producer of oil, no. 1 producer of natural gas, and no. 1 producer

⁸¹ Moore and White, *supra*, p. 11.

of coal, achieving energy independence, even energy dominance, as President Trump calls it.

The United States has an abundance of fossil fuel resources that give America distinct geopolitical and economic advantages. In fact, the United States has more energy resources than any other nation on Earth. Only one nation, Russia, has even half as many energy resources as the United States. The United States truly has an opportunity to become energy dominant, but to do so, it must remove all the unnecessary restrictions on energy production stemming from the Endangerment Finding.

Among these fossil fuel resources, the most abundant is coal, which offers approximately 283 years of supply that are more resistant to price shocks and the manipulation of foreign markets than any other source of fuel.⁸² The United States has the largest oil reserves in the world, with more recoverable oil reserves than either Saudi Arabia or Russia.⁸³ Lastly, the US is the largest producer of natural gas in the world. The EIA estimates current natural gas supplies are large enough to last for nearly 100 years at current rates of consumption.⁸⁴

Giving up on those abundant energy resources would involve the largest opportunity cost literally in world history.

Under the previous administration, these resources were treated as liabilities, rather than assets. That has already changed under the Trump administration. By focusing on truly environmentally responsible development of domestic energy resources, thereby ensuring the United States has abundant access to affordable energy, federal and state policymakers are taking concrete steps toward reviving the American economy and putting Americans first.

Indeed, enjoying the world's leading oil industry, the world's leading natural gas industry, and the world's leading coal industry, all in one economy is already

⁸² U.S. Energy Information Administration, "How Much Coal is Left?" *Energy Explained*, April 18, 2017, https://www.eia.gov/energyexplained/index.cfm?page=coal_reserves.

⁸³ Per Magnus Nysveen, "United States Now Holds More Recoverable Oil than Saudi Arabia," Rystad Energy, July 04, 2016, <https://www.rystadenergy.com/NewsEvents/PressReleases/united-states-now-holds-more-oil-reserves-than-saudi-arabia>.

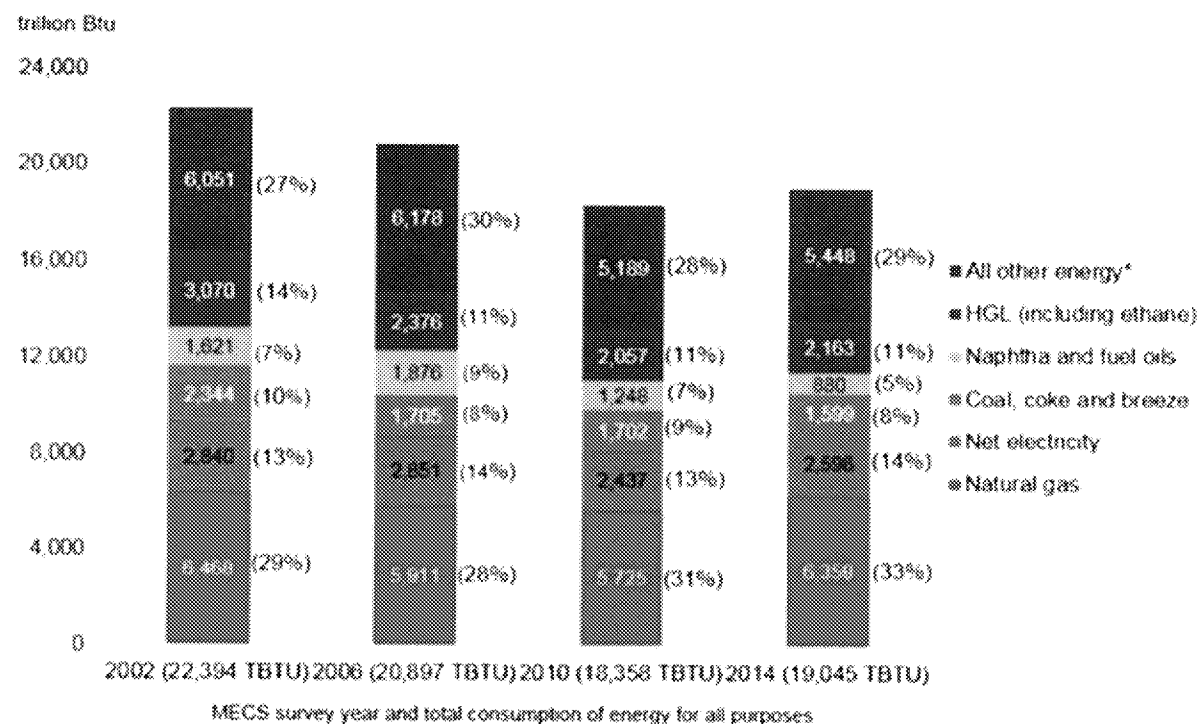
⁸⁴ U.S. Energy Information Administration, "How Much Natural Gas Does the US have, and How Long will it Last?" Accessed July 24, 2017, <https://www.eia.gov/tools/faqs/faq.php?id=58&t=8>.

restoring the American economy to world leadership, and reinvigorating the American Dream that has inspired the world for three centuries. To think we would be foolish enough to give all that up for an erroneous fairy tale about catastrophic, anthropogenic, global warming is to imply madness to what has been formerly called the world's leading hyperpower.

B. That virtually unlimited supply of reliable, low cost energy will bring manufacturing back to the U.S., which has already begun in fact.

President Trump has made increasing manufacturing in the United States a key goal of his Presidency. However, this effort will be severely hampered if manufacturers and businesses do not have access to affordable energy resources, particularly oil, natural gas, and electricity. These fuels make up the largest components of energy used by industry in the U.S. (See Figure 18).

Figure 18
Manufacturing Energy Consumption Has Increased
for the First Time Since 2002



Source: U.S. Energy Information Administration

* Shipments were subtracted from all other energy

Natural gas accounts for the largest share of energy used by industry, at 33 percent. Electricity accounts for the second largest primary or secondary source of energy at 14 percent, followed by coal and oil. "All other energy" represents a combination of technologies such as heat capture, waste re-use, and other energy efficiency measures. *Source:* U.S. Energy Information Administration, "Manufacturing Energy Consumption Survey," October 13, 2016.⁸⁵

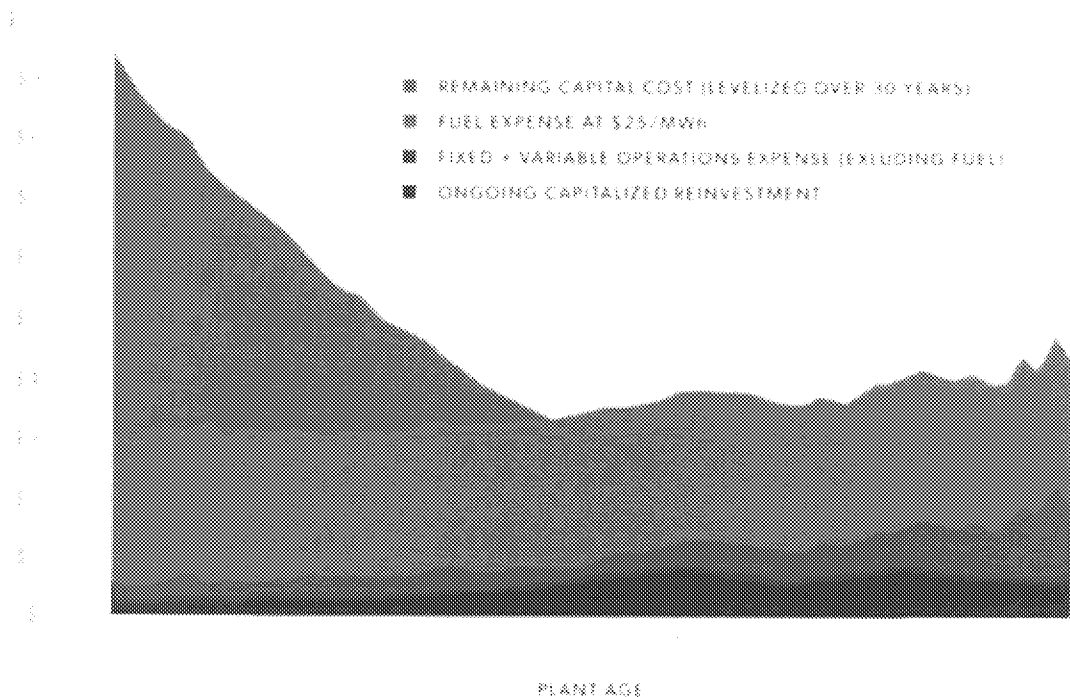
Higher energy costs are much like higher taxes, lower energy costs like lower taxes, particularly for manufacturing, which is energy intensive. America's world leading supply of reliable, low cost energy gives America a major advantage in the global economy, particularly regarding manufacturing, aiding President Trump in achieving his goal. America's booming energy supplies, already lowering energy costs, are already causing a renaissance in American manufacturing, which is a major factor promoting booming American economic growth.

But under unnecessary, counterproductive regulation like the old, Obama-era Clean Power Plan, this crucial energy advantage enjoyed by America would be lost. Energy prices would soar, like they have in Germany, because 1) coal-fired electricity generation will decline, increasing electricity prices, and 2) increasing use of natural gas for electricity generation will put upward price pressure on natural gas prices. That would preempt the opportunity for the renaissance of American manufacturing, a central President Trump policy.

Prematurely shuttering existing coal plants would further cause electricity prices to increase because existing plants can generate electricity more affordably than new power plants, since they have already paid off much of the up-front capital and financing costs. Much like it is less expensive to live in a house after the mortgage has been completely paid off, these power plants are able to reduce their prices and still make a profit on the electricity they sell (See Figure 19).

⁸⁵ U.S. Energy Information Administration, "Manufacturing Energy Consumption Survey," October 13, 2016, [https://www.eia.gov/consumption/manufacturing/reports/2014/pre_estimates/?src=%E2%80%B9%20Consumption%20%20%20%20%20%20Manufacturing%20Energy%20Consumption%20Survey%20\(MECS\)-f1](https://www.eia.gov/consumption/manufacturing/reports/2014/pre_estimates/?src=%E2%80%B9%20Consumption%20%20%20%20%20%20Manufacturing%20Energy%20Consumption%20Survey%20(MECS)-f1)

Figure 19
LCOE from Coal in 2012 \$/MWh by Plant Age
30-Year Outlook

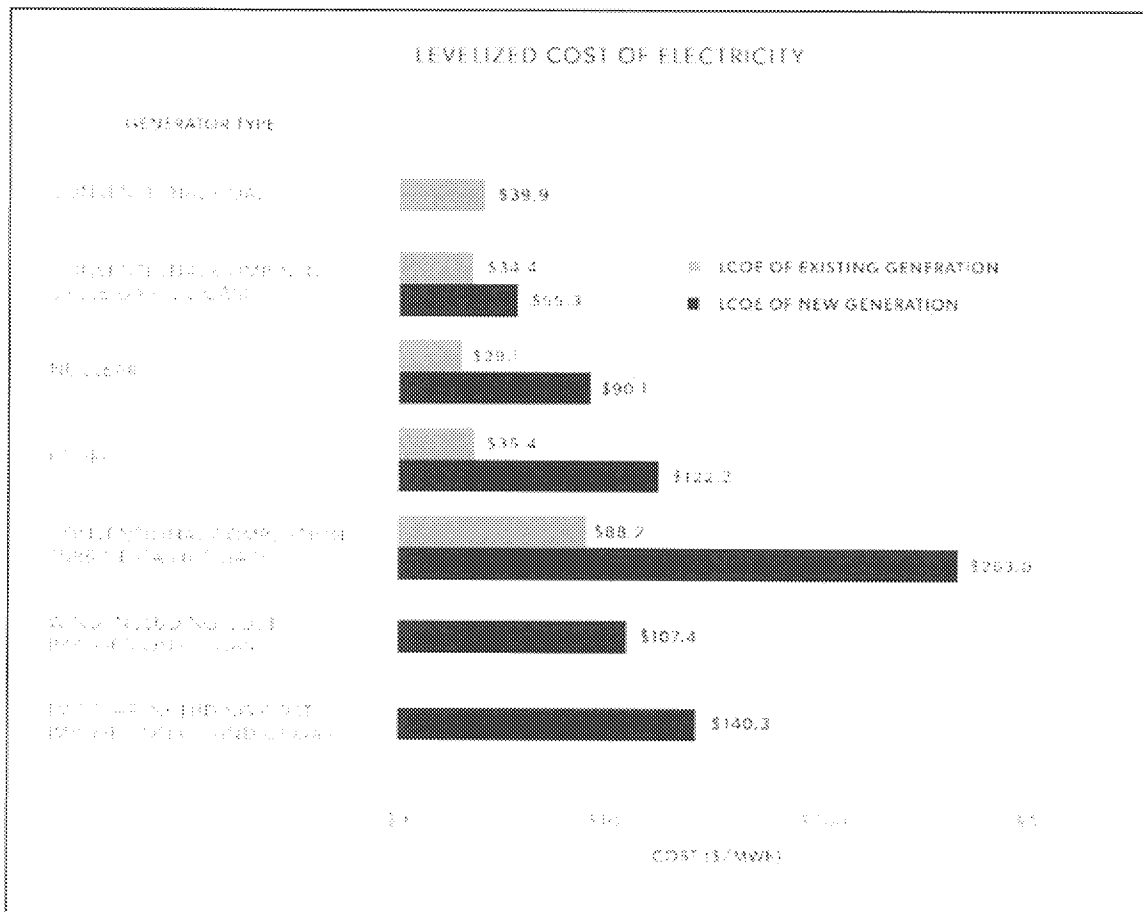


Analyses of the changes in going-forward costs for both coal and nuclear plants show these costs increase by less than 1 percent per year over the observed age distribution of existing plants. At an average age of 38 years, the typical existing coal-fired power plant will likely not be economic to retire and replace for another decade or more. *Source:* Tom Stacy and George Taylor, *The Levelized Cost of Electricity from Existing Generation Resources*, Institute for Energy Research, July 2016, page 22.

Electricity generation from existing natural gas, coal, nuclear, and hydro power is consequently significantly less expensive than new generating resources. In many cases, existing electricity resources can generate electricity for one-third the cost of new wind power and one-quarter of the cost of new solar. For example, Stacey and Taylor say existing coal-fired power plants generate reliable electricity at a cost of \$39.9 per megawatt-hour on average, existing nuclear for \$29.1/MWh, natural gas \$34.4/MWh, and hydroelectric for \$35.4. Each of these resources is about one-third of the cost of new wind production, which generates electricity at a cost of

\$107.4/MWh (see Figure 20).⁸⁶ So, less reliable renewable energy costs three times as much as reliable conventional energy.

Figure 20



Electricity generation from existing natural gas, coal, nuclear, and hydro power is significantly less expensive than new generating resources. In many cases, existing electricity resources can generate electricity for one-third of the cost of new wind power and one quarter of the cost of new solar.

The lowest possible electricity rates will only be achieved by keeping existing generating resources in operation until their product becomes uneconomic compared to the cost of replacing it.⁸⁷

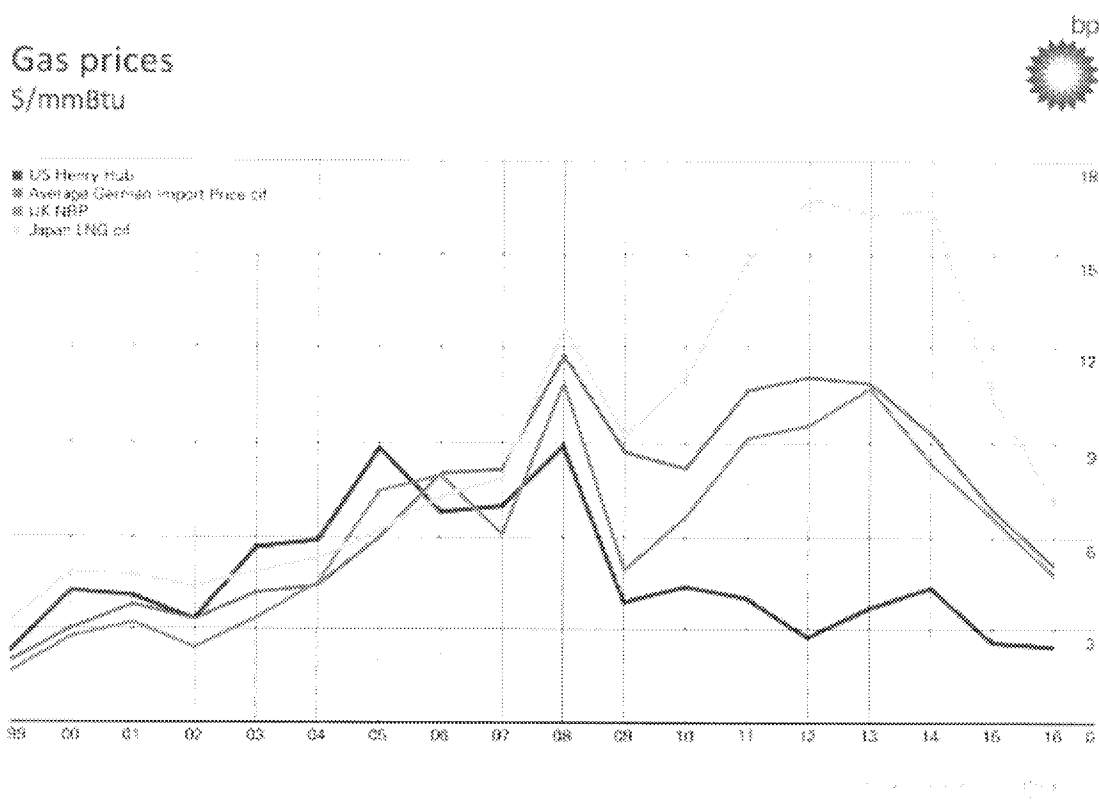
⁸⁶ Tom Stacy and George Taylor, "The Levelized Cost of Electricity From Existing Generation Resources," The Institute for Energy Research, July 2016, http://instituteforenergyresearch.org/wp-content/uploads/2016/07/IER_LCOE_2016-2.pdf.

⁸⁷ Tom Stacy and George Taylor, "The Levelized Cost of Electricity From Existing Generation Resources," The Institute for Energy Research, July 2016, http://instituteforenergyresearch.org/wp-content/uploads/2016/07/IER_LCOE_2016-2.pdf.

The manufacturing and industrial sectors of the economy accounted for approximately one-third of total energy consumption in the U.S in 2015.⁸⁸ Aside from labor, the cost of energy is one of the largest expenses for energy-intensive businesses such as steelmaking, manufacturing, fertilizer production, aluminum processing, and plastics manufacturing.

Revolutionary improvements in horizontal drilling technology and exploration technology, combined with increased use of hydraulic fracturing (a proven technique more than 70 years old), produced a natural gas boom in the U.S. As a result, the United States has the lowest natural gas prices of any developed nation, which gives American firms a distinct competitive advantage when competing against foreign firms in the global marketplace (See Figure 21). This advantage has already begun to produce a significant renaissance in American manufacturing.

Figure 21



Natural gas prices in the United States are significantly lower than in other industrialized nations because hydraulic fracturing has made the United States the largest producer of natural gas in the world. Although the price differential

⁸⁸ National Academies of Science, Engineering and Medicine. "How We use Energy," Accessed July 30, 2017. <http://needtoknow.nas.edu/energy/energy-use/industry/>.

between the US and the world has declined in the most recent years due to larger supplies of liquid natural gas, large differences are estimated to persist for the foreseeable future.⁸⁹

Industries differ significantly in their inherent technological energy intensities. For example, around 10 percent of the overall input costs for ‘chemical manufacturing’ and ‘primary metal manufacturing’ constitutes energy costs, while the nondurable consumer goods energy cost share is less than 5 percent.⁹⁰ Manufacturing overall tends to be energy intensive. The reduction in these primary energy costs has already begun to translate into energy-intensive manufacturing companies moving to the United States.

For example, low natural gas prices are one reason why Voestalpine, an Austrian steel firm, Japanese oil refiner Idemitsu Kosan, and trading house Mitsui & Co. have opened operations in the United States.⁹¹ In total, lower energy prices generated \$47 billion in economic opportunity, nearly \$25 billion in labor income, and the equivalent of 387,500 jobs in 2015.⁹²

Gains in investment and job creation are only expected to grow in the coming years. The American Chemical Society recently announced the chemicals industry will invest more than \$130 billion in the coming decade, creating roughly 462,000 new jobs for workers at these facilities.⁹³ A PricewaterhouseCoopers report found the annual costs savings from low natural gas prices could spur nearly a million manufacturing jobs by 2030 and 1.41 million jobs by 2040.⁹⁴

In contrast, the International Energy Agency estimates Europe will *lose* one-third of its global market share of energy-intensive exports over the next two decades because European energy prices will stay stubbornly higher than US energy prices. European gas import prices are significantly higher than in the US while industrial

⁸⁹ BP Global, “Natural Gas Prices,” BP Statistical Review, Accessed July 30, 2017, <http://www.bp.com/en/global/corporate/energy-economics/statistical-review-of-world-energy/natural-gas/natural-gas-prices.html>

⁹⁰ Rabah Arezki, “Fracking Has Made U.S. Manufacturing More Competitive,” *The London School of Economics and Political Science*, December 16, 2016, <http://blogs.lse.ac.uk/businessreview/2016/12/16/fracking-has-made-us-manufacturing-more-competitive/>.

⁹¹ “Shale Boom Sparks U.S. Industrial Revival,” CNBC, March 26, 2013, <http://www.cnbc.com/id/100592605>.

⁹² U.S. Chamber of Commerce Institute for 21st Century Energy, “What if America’s Energy Renaissance Never Actually Happened?” September 22, 2016, <http://www.energyxxi.org/sites/default/files/er-fullreport-16.pdf>.

⁹³ Id.

⁹⁴ Beth Gillin, “Shale Gas Provides Major Boost to US Manufacturing,” PricewaterhouseCoopers Business Advocate, January 10, 2015, <https://mcdonaldhopkins.com/Insights/Blog/Energy-Insights/2015/01/10/shale-gas-provides-major-boost-to-us-manufacturing>.

electricity prices are about twice as high, creating an energy price gap some experts expect to last “at least 20 years.”⁹⁵

Low energy prices provide a large competitive advantage to American manufacturing firms and other energy-intensive industries. Therefore, energy policies that prioritize domestic production, including coal, oil, and natural gas, truly put “America First” in both a tangible and metaphorical sense, with the resulting investments creating hundreds of thousands of advanced, good paying, manufacturing jobs. The choices facing the American economy are indeed stark as Moore and White say – booming, world leading growth once again, versus long term American economic stagnation and decline.

C. The resulting American economic renaissance would ultimately eliminate poverty in America.

With the world leading oil industry, the world leading natural gas industry, and the world leading coal industry all in one economy, America is now poised to finally win the War on Poverty after all these years, eliminating poverty in America entirely. That is because a good paying job is the world leading solution for poverty, especially if welfare and education policies are also reformed.

President Trump has already reignited booming American economic growth, which over the past year has already increased by more than 50% from the stagnant, less than 2% real growth per year averaged by President Obama over his entire 8 years in office. The stock market used to be recognized as a leading economic indicator, and the all-time records already set in the markets during Trump’s first year portend further, even faster growth.

That was achieved by President Trump’s deregulation, and expected tax reforms that have now been enacted. Now the further extension of that through further energy deregulation will liberate America for energy independence and even dominance, leading the world in all three of the fossil fuels that powered the Industrial Revolution, and the booming growth that created the modern world and rapidly declining poverty throughout the globe.

Indeed, under current U.S. law, any job will eliminate poverty for any family. That is because the minimum wage under current law, plus the current Earned Income

⁹⁵ Pilita Clark, “Energy Price Gap with the US to Hurt Europe for ‘At Least 20 Years.’” *Financial Times*, January 29, 2014, <https://www.ft.com/content/80950df8-8901-11e3-9f48-00144feab7de>.

Tax Credit, plus the newly increased child tax credit under tax reform, equals or exceeds the poverty line for every possible family combination – a single mother with one child, single mom with two children, single mom with three children, etc.⁹⁶

The just enacted tax reform now going into effect will stimulate the economy to even faster growth, achieving the long overdue full recovery from the 2008-09 recession.⁹⁷ That will mean even more good paying jobs, and even faster elimination of poverty in America. The alternative roads for America grow even more stark.

Granting this Petition to Reopen and Reconsider the Endangerment Finding would provide the opportunity to further President Trump's policies that are producing these dramatically positive results.

CONCLUSION

For all the foregoing reasons, the FAIR Energy Foundation respectfully submits that the EPA should grant this Petition to Reopen and Reconsider the Endangerment Finding, and ultimately withdraw and rescind that finding, opening the way to even more pro-growth energy deregulation.

Respectfully submitted,

Dave Wallace
President
FAIR Energy Foundation
805 15th St. NW, Suite 100
Washington, DC 20005
Phone: 410-984-2194
dave.wallace@fairenergyfoundation.org

⁹⁶ Peter J. Ferrara, *Power to the People: The New Road to Freedom and Prosperity for the Poor, Seniors, and Those Most in Need of the World's Best Health Care* (Arlington Heights, IL: The Heartland Institute, 2015).

⁹⁷ Peter J. Ferrara, *Why the United States Has Suffered the Worst Economic Recovery Since the Great Depression*, Heartland Institute Policy Brief, August 1, 2016.

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/13/2021 2:30:05 PM
To: Fugh, Justina [Fugh.Justina@epa.gov]
CC: Payne, James (Jim) [payne.james@epa.gov]; Griffo, Shannon [Griffo.Shannon@epa.gov]
Subject: RE: for your digital signature

Thanks, Justina. I'm hoping to schedule a call about it this morning so that helps.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Fugh, Justina <Fugh.Justina@epa.gov>
Sent: Wednesday, January 13, 2021 8:47 AM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>; Griffo, Shannon <Griffo.Shannon@epa.gov>
Subject: Re: for your digital signature

Great! We just need Jim to sign. What's the timing for you? If he's slammed, then you may still proceed since we know the authorization will be forthcoming.

Sent from my iPhone

On Jan 13, 2021, at 1:54 AM, Gustafson, Adam <Gustafson.Adam@epa.gov> wrote:

Justina,

Thanks for going above and beyond to get this done quickly. It looks good to me.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Fugh, Justina <Fugh.Justina@epa.gov>
Sent: Wednesday, January 13, 2021 1:44 AM
To: Payne, James (Jim) <payne.james@epa.gov>
Cc: Griffo, Shannon <Griffo.Shannon@epa.gov>; Gustafson, Adam <Gustafson.Adam@epa.gov>
Subject: for your digital signature

Hi Jim,

As I expect that time is of the essence for Adam's participation, here is the impartiality determination for your digital signature.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

From: Gustafson, Adam <Gustafson.Adam@epa.gov>
Sent: Wednesday, January 13, 2021 12:59 AM
To: Fugh, Justina <Fugh.Justina@epa.gov>; Griffo, Shannon <Griffo.Shannon@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>
Subject: RE: Updated Recusal Statement for your review

Thank you, Justina. I would appreciate an impartiality determination. Presumably it can be based on your June 17, 2020 impartiality determination. The matter is a CEI petition for reconsideration of EPA's 2009 Greenhouse Gas Endangerment Finding—likely this one:

<https://cei.org/sites/default/files/CEI%20Petition%20for%20Rulemaking%20on%20Endangerment%20017%20corrected.pdf>

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Fugh, Justina <Fugh.Justina@epa.gov>
Sent: Tuesday, January 12, 2021 11:01 PM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>; Griffo, Shannon <Griffo.Shannon@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>
Subject: RE: Updated Recusal Statement for your review

Hi Adam,
Shannon is out of the office this week so let me address your question. We used the word "case" but within the ethics context, we mean any specific party matter. An administrative petition for reconsideration is indeed a specific party matter. Assuming that you did not participate in the underlying matter prior to joining EPA, then you still have a covered relationship with CEI under the impartiality standards. In order to participate in this administrative petition for reconsideration, we will have to issue you a written impartiality determination.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

From: Gustafson, Adam <Gustafson.Adam@epa.gov>
Sent: Tuesday, January 12, 2021 10:39 PM
To: Griffo, Shannon <Griffo.Shannon@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>; Fugh, Justina <Fugh.Justina@epa.gov>
Subject: RE: Updated Recusal Statement for your review

Shannon,

Under the ethics waiver I received, I'm allowed to participated in "any other potential cases arising at EPA where [my former client] CEI is a party and [I] did not previously participate personally and substantially while serving as an attorney for CEI or any other party."

In this context, does "case" include an administrative petition for reconsideration? CEI petitioned EPA to reconsider a regulatory action, and I have been asked whether I can work on the Agency's response.

Here is what my updated recusal statement says:

On June 17, 2020, the White House granted me a limited waiver of the provisions of Section 1, Paragraph 6, for one of my former clients, the Competitive Enterprise Institute (CEI). This waiver permits me to participate in specific party matters in which CEI is a party, provided that I was not previously involved in that matter. To address my "covered relationship" with CEI under the federal impartiality standards, EPA's Designated Agency Ethics Official issued me an impartiality determination on that same day. See attachments. I am now authorized to participate personally and substantially in *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.) and any other potential cases arising at EPA in which my former client, CEI, is a party, provided that I did not previously participate personally and substantially in that same matter for CEI or any other party. I may participate personally and substantially, including meetings or communications related to such cases even if CEI is present. But I understand that I must remain recused from any specific party matters in which my former client is a party if I participated personally and substantially previously.

I will send a separate request to schedule a one-on-one as you suggest. Maybe we can kill two birds with one stone.

Adam Gustafson
Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Griffo, Shannon <Griffo.Shannon@epa.gov>
Sent: Friday, June 19, 2020 1:28 PM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Cc: Payne, James <payne.james@epa.gov>; Fugh, Justina <Fugh.Justina@epa.gov>
Subject: Updated Recusal Statement for your review

Hi Adam,

We've updated your recusal statement to reflect the issuance of your pledge waiver and impartiality determination, which would also be included as attachments to your revised recusal. Please take a look and let us know if you have any questions or comments.

Thanks,
Shannon

Shannon Griffo
Ethics Attorney
Office of General Counsel, Ethics
U.S. Environmental Protection Agency
(202) 564-7061
Griffo.Shannon@epa.gov

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/13/2021 2:29:01 PM
To: Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]
CC: Williams, Melina [Williams.Melina@epa.gov]
Subject: RE: Endangerment finding petition denial

Thanks, Gautam. As of this morning, Anne had **Ex. 5 Deliberative Process (DP)**
Ex. 5 Deliberative Process (DP) I'm available to discuss until 11 this morning.

Adam Gustafson
Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>
Sent: Tuesday, January 12, 2021 10:05 PM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Cc: Williams, Melina <Williams.Melina@epa.gov>
Subject: Fwd: Endangerment finding petition denial

Hi Adam. Sending this chain in response to your email. My apologies for not copying you.

++++
(202) 564-5647 (o)
(202) 695-6287 (c)

Begin forwarded message:

From: "Srinivasan, Gautam" <Srinivasan.Gautam@epa.gov>
Date: January 11, 2021 at 9:05:00 AM EST
To: "Fotouhi, David" <Fotouhi.David@epa.gov>
Subject: RE: Endangerment finding petition denial

Yes, and my apologies. I meant to send you an email on Friday. **Ex. 5 Deliberative Process (DP)**
Ex. 5 Deliberative Process (DP)
Ex. 5 Deliberative Process (DP)

++++
(202) 564-5647 (o)
(202) 695-6287 (c)

From: Fotouhi, David <Fotouhi.David@epa.gov>
Sent: Sunday, January 10, 2021 10:03 PM
To: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>
Subject: RE: Endangerment finding petition denial

Ex. 5 Deliberative Process (DP)

David Fotouhi

Acting General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

From: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>
Sent: Wednesday, January 6, 2021 7:13 PM
To: Fotouhi, David <Fotouhi.David@epa.gov>
Subject: RE: Endangerment finding petition **Ex. 5 Deliberative Process (DP)**

Will do.

++++
(202) 564-5647 (o)
(202) 695-6287 (c)

From: Fotouhi, David <Fotouhi.David@epa.gov>
Sent: Wednesday, January 6, 2021 7:04 PM
To: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>
Subject: Re: Endangerment finding petition denial

I've asked Anne to **Ex. 5 Deliberative Process (DP)** Could you let me know tomorrow if someone has reached out?

Sent from my iPhone

On Jan 6, 2021, at 6:54 PM, Srinivasan, Gautam <Srinivasan.Gautam@epa.gov> wrote:

Per chat yesterday, **Ex. 5 Deliberative Process (DP)**
Ex. 5 Deliberative Process (DP) Give a call if needed; I am available.

++++
(202) 564-5647 (o)
(202) 695-6287 (c)

From: Fotouhi, David <Fotouhi.David@epa.gov>
Sent: Tuesday, January 5, 2021 7:29 PM
To: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>
Subject: Endangerment finding petition denial

DELIBERATIVE

The third floor and OAR leadership would like **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Would it be feasible to see a draft by Monday?

Thank you,

David

David Fotouhi

Acting General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/14/2021 7:00:17 PM
To: Fotouhi, David [Fotouhi.David@epa.gov]
Subject: Re: Endangerment petitions

Hi David, Ex. 6 Personal Privacy (PP) I'm available by phone. I talked through this with Anne and Gautam separately yesterday. Ex. 5 Deliberative Process (DP)

Sent from my iPhone

> On Jan 14, 2021, at 9:28 AM, Fotouhi, David <Fotouhi.David@epa.gov> wrote:

>

> I got an update from Anne and Karl that didn't sound promising on this. Could we circle up after senior staff? I think we may need to deploy an alternative approach.

>

> David Fotouhi

>

> Acting General Counsel

> U.S. Environmental Protection Agency

> Tel: +1 202.564.1976

> fotouhi.david@epa.gov

>

> -----Original Message-----

> From: Fotouhi, David

> Sent: Thursday, January 14, 2021 9:41 AM

> To: Gustafson, Adam <Gustafson.Adam@epa.gov>

> Subject: Endangerment petitions

>

> Could you please get a status update this morning on the progress toward a draft? I'd like us to see a draft today if possible.

>

> Sent from my iPhone

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/14/2021 7:33:48 PM
To: Fotouhi, David [Fotouhi.David@epa.gov]
Subject: Re: Endangerment Finding Petition Denial

Will do.

Sent from my iPhone

On Jan 14, 2021, at 12:05 PM, Fotouhi, David <Fotouhi.David@epa.gov> wrote:

Yes, I think that's where things stand.

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Sent from my iPhone

On Jan 14, 2021, at 2:03 PM, Gustafson, Adam <Gustafson.Adam@epa.gov> wrote:

Karl's message is not encouraging. Do you want me to

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Sent from my iPhone

Begin forwarded message:

From: "Moor, Karl" <Moor.Karl@epa.gov>
Date: January 14, 2021 at 6:48:57 AM MST
To: "Gustafson, Adam" <Gustafson.Adam@epa.gov>
Subject: Re: Endangerment Finding Petition Denial

Adam, likewise, I am assuming we will not hear from him.

Regards, Karl

On Jan 13, 2021, at 7:00 PM, Gustafson, Adam
<Gustafson.Adam@epa.gov> wrote:

Karl,

Have you nudged

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Adam

Adam Gustafson

Deputy General Counsel

Office of General Counsel

U.S. Environmental Protection Agency

Office: 202-564-7263

Cell: 202-836-3570

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/14/2021 9:08:06 PM
To: Fugh, Justina [Fugh.Justina@epa.gov]; Payne, James (Jim) [payne.james@epa.gov]
CC: Griffo, Shannon [Griffo.Shannon@epa.gov]
Subject: RE: for your digital signature

Many thanks!

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Fugh, Justina <Fugh.Justina@epa.gov>
Sent: Thursday, January 14, 2021 4:02 PM
To: Payne, James (Jim) <payne.james@epa.gov>; Gustafson, Adam <Gustafson.Adam@epa.gov>
Cc: Griffo, Shannon <Griffo.Shannon@epa.gov>
Subject: RE: for your digital signature

Yep, I'll sign it for you, Adam! So go ahead and participate now Documentation to follow, saying that I am affirming the decision made whatever day I sent the draft forward. I've got a call now so can't be on the VPN until a little later, but no worries!

From: Payne, James (Jim) <payne.james@epa.gov>
Sent: Thursday, January 14, 2021 4:00 PM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>; Fugh, Justina <Fugh.Justina@epa.gov>
Cc: Griffo, Shannon <Griffo.Shannon@epa.gov>
Subject: RE: for your digital signature

I believe Justina plans to handle this today.

From: Gustafson, Adam <Gustafson.Adam@epa.gov>
Sent: Thursday, January 14, 2021 3:59 PM
To: Fugh, Justina <Fugh.Justina@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>; Griffo, Shannon <Griffo.Shannon@epa.gov>
Subject: RE: for your digital signature

Jim,

If Justina's draft meets with your approval are you able to sign it tomorrow?

Adam

Adam Gustafson

Deputy General Counsel

Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Fugh, Justina <Fugh.Justina@epa.gov>
Sent: Wednesday, January 13, 2021 8:47 AM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>; Griffo, Shannon <Griffo.Shannon@epa.gov>
Subject: Re: for your digital signature

Great! We just need Jim to sign. What's the timing for you? If he's slammed, then you may still proceed since we know the authorization will be forthcoming.

Sent from my iPhone

On Jan 13, 2021, at 1:54 AM, Gustafson, Adam <Gustafson.Adam@epa.gov> wrote:

Justina,

Thanks for going above and beyond to get this done quickly. It looks good to me.

Adam Gustafson
Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Fugh, Justina <Fugh.Justina@epa.gov>
Sent: Wednesday, January 13, 2021 1:44 AM
To: Payne, James (Jim) <payne.james@epa.gov>
Cc: Griffo, Shannon <Griffo.Shannon@epa.gov>; Gustafson, Adam <Gustafson.Adam@epa.gov>
Subject: for your digital signature

Hi Jim,
As I expect that time is of the essence for Adam's participation, here is the impartiality determination for your digital signature.
Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308
North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004
for the zip code) | phone 202-564-1786 | fax 202-564-1772

From: Gustafson, Adam <Gustafson.Adam@epa.gov>
Sent: Wednesday, January 13, 2021 12:59 AM

To: Fugh, Justina <Fugh.Justina@epa.gov>; Griffo, Shannon <Griffo.Shannon@epa.gov>

Cc: Payne, James (Jim) <payne.james@epa.gov>

Subject: RE: Updated Recusal Statement for your review

Thank you, Justina. I would appreciate an impartiality determination. Presumably it can be based on your June 17, 2020 impartiality determination. The matter is a CEI petition for reconsideration of EPA's 2009 Greenhouse Gas Endangerment Finding—likely this one:

<https://cei.org/sites/default/files/CEI%20Petition%20for%20Rulemaking%20on%20Endangerment%20017%20corrected.pdf>

Adam Gustafson

Deputy General Counsel

Office of General Counsel

U.S. Environmental Protection Agency

Office: 202-564-7263

Cell: 202-836-3570

From: Fugh, Justina <Fugh.Justina@epa.gov>

Sent: Tuesday, January 12, 2021 11:01 PM

To: Gustafson, Adam <Gustafson.Adam@epa.gov>; Griffo, Shannon <Griffo.Shannon@epa.gov>

Cc: Payne, James (Jim) <payne.james@epa.gov>

Subject: RE: Updated Recusal Statement for your review

Hi Adam,

Shannon is out of the office this week so let me address your question. We used the word “case” but within the ethics context, we mean any specific party matter. An administrative petition for reconsideration is indeed a specific party matter. Assuming that you did not participate in the underlying matter prior to joining EPA, then you still have a covered relationship with CEI under the impartiality standards. In order to participate in this administrative petition for reconsideration, we will have to issue you a written impartiality determination.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308
North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004
for the zip code) | phone 202-564-1786 | fax 202-564-1772

From: Gustafson, Adam <Gustafson.Adam@epa.gov>

Sent: Tuesday, January 12, 2021 10:39 PM

To: Griffo, Shannon <Griffo.Shannon@epa.gov>

Cc: Payne, James (Jim) <payne.james@epa.gov>; Fugh, Justina <Fugh.Justina@epa.gov>

Subject: RE: Updated Recusal Statement for your review

Shannon,

Under the ethics waiver I received, I'm allowed to participated in “any other potential cases arising at EPA where [my former client] CEI is a party and [I] did not previously participate personally and substantially while serving as an attorney for CEI or any other party.”

In this context, does “case” include an administrative petition for reconsideration? CEI petitioned EPA to reconsider a regulatory action, and I have been asked whether I can work on the Agency’s response.

Here is what my updated recusal statement says:

On June 17, 2020, the White House granted me a limited waiver of the provisions of Section 1, Paragraph 6, for one of my former clients, the Competitive Enterprise Institute (CEI). This waiver permits me to participate in specific party matters in which CEI is a party, provided that I was not previously involved in that matter. To address my “covered relationship” with CEI under the federal impartiality standards, EPA’s Designated Agency Ethics Official issued me an impartiality determination on that same day. See attachments. I am now authorized to participate personally and substantially in *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.) and any other potential cases arising at EPA in which my former client, CEI, is a party, provided that I did not previously participate personally and substantially in that same matter for CEI or any other party. I may participate personally and substantially, including meetings or communications related to such cases even if CEI is present. But I understand that I must remain recused from any specific party matters in which my former client is a party if I participated personally and substantially previously.

I will send a separate request to schedule a one-on-one as you suggest. Maybe we can kill two birds with one stone.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Griffo, Shannon <Griffo.Shannon@epa.gov>
Sent: Friday, June 19, 2020 1:28 PM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Cc: Payne, James <payne.james@epa.gov>; Fugh, Justina <Fugh.Justina@epa.gov>
Subject: Updated Recusal Statement for your review

Hi Adam,

We’ve updated your recusal statement to reflect the issuance of your pledge waiver and impartiality determination, which would also be included as attachments to your revised recusal. Please take a look and let us know if you have any questions or comments.

Thanks,
Shannon

Shannon Griffo
Ethics Attorney
Office of General Counsel, Ethics
U.S. Environmental Protection Agency
(202) 564-7061
Griffo.Shannon@epa.gov

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/15/2021 2:59:34 AM
To: Fugh, Justina [Fugh.Justina@epa.gov]
CC: Payne, James (Jim) [payne.james@epa.gov]; Griffo, Shannon [Griffo.Shannon@epa.gov]
Subject: RE: signed impartiality determination

Thank you, Justina.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Fugh, Justina <Fugh.Justina@epa.gov>
Sent: Thursday, January 14, 2021 6:19 PM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>; Griffo, Shannon <Griffo.Shannon@epa.gov>
Subject: signed impartiality determination

Hi Adam,

Attached is the signed impartiality determination for participation in the petition for reconsideration of the 2009 greenhouse gas endangerment finding. I've dated it today but you can see that its effective date is yesterday, when I indicated to you by email that we would approve it.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/16/2021 5:00:19 PM
To: Raymond, Kelley [Raymond.Kelley@epa.gov]
CC: David Fotouhi (fotouhi.david@epa.gov) [fotouhi.david@epa.gov]
Subject: FW: GHG NAAQS petitions
Attachments: GHG Denial Cover Letter Template.docx

Kelley,

As you know,

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Does OAR want to identify one or more contact persons within OAR for the GHG NAAQS, 115 (international), HAP, and Endangerment Finding petitions?

Here and attached is the template I plan to fill out:

Ex. 5 Deliberative Process (DP)

Please feel free to make any edits and nominate any points of contact.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/18/2021 11:43:42 AM
To: David Fotouhi (fotouhi.david@epa.gov) [fotouhi.david@epa.gov]
Subject: Draft Endangerment Finding Petition Denial
Attachments: 20210118 GHG Endangerment Denial w cover letters.docx

DELIBERATIVE

David,

This draft responds to Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/18/2021 5:31:26 PM
To: Fotouhi, David [fotouhi.david@epa.gov]
Subject: RE: Draft Endangerment Finding Petition Denial

Opening the document now and will call momentarily.

Adam Gustafson
Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Fotouhi, David <Fotouhi.David@epa.gov>
Sent: Monday, January 18, 2021 11:11 AM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Subject: RE: Draft Endangerment Finding Petition Denial

Ex. 5 Deliberative Process (DP)

Are you free for a quick call? Let me know what time works.

David Fotouhi

Acting General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

From: Fotouhi, David
Sent: Monday, January 18, 2021 10:19 AM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Subject: RE: Draft Endangerment Finding Petition Denial

Thanks! Taking a look now.

Ex. 5 Deliberative Process (DP)

David Fotouhi

Acting General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

From: Gustafson, Adam <Gustafson.Adam@epa.gov>
Sent: Monday, January 18, 2021 6:44 AM
To: Fotouhi, David <Fotouhi.David@epa.gov>
Subject: Draft Endangerment Finding Petition Denial

DELIBERATIVE

David,

This draft responds to

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Adam Gustafson

Deputy General Counsel

Office of General Counsel

U.S. Environmental Protection Agency

Office: 202-564-7263

Cell: 202-836-3570

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/18/2021 7:09:57 PM
To: Fotouhi, David [fotouhi.david@epa.gov]
Subject: RE: Draft Endangerment Finding Petition Denial
Attachments: 20210118c GHG Endangerment Denial w cover letter (clean).docx

Please use this version. (I changed the font to Times New Roman, which seems to be typical.)

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Gustafson, Adam
Sent: Monday, January 18, 2021 2:07 PM
To: Fotouhi, David <fotouhi.david@epa.gov>
Subject: RE: Draft Endangerment Finding Petition Denial

Here it is in a signature-ready format with the header pasted in.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Fotouhi, David <Fotouhi.David@epa.gov>
Sent: Monday, January 18, 2021 11:11 AM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Subject: RE: Draft Endangerment Finding Petition Denial

Ex. 5 Deliberative Process (DP)

Are you free for a quick call? Let me know what time works.

David Fotouhi

Acting General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

From: Fotouhi, David
Sent: Monday, January 18, 2021 10:19 AM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Subject: RE: Draft Endangerment Finding Petition Denial

Thanks! Taking a look now.

Ex. 5 Deliberative Process (DP)

David Fotouhi

Acting General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

From: Gustafson, Adam <Gustafson.Adam@epa.gov>

Sent: Monday, January 18, 2021 6:44 AM

To: Fotouhi, David <Fotouhi.David@epa.gov>

Subject: Draft Endangerment Finding Petition Denial

DELIBERATIVE

David,

This draft responds to

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/18/2021 7:07:11 PM
To: Fotouhi, David [fotouhi.david@epa.gov]
Subject: RE: Draft Endangerment Finding Petition Denial
Attachments: 20210118c GHG Endangerment Denial w cover letter (clean).docx

Here it is in a signature-ready format with the header pasted in.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Fotouhi, David <Fotouhi.David@epa.gov>
Sent: Monday, January 18, 2021 11:11 AM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Subject: RE: Draft Endangerment Finding Petition Denial

Ex. 5 Deliberative Process (DP)

Are you free for a quick call? Let me know what time works.

David Fotouhi

Acting General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

From: Fotouhi, David
Sent: Monday, January 18, 2021 10:19 AM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Subject: RE: Draft Endangerment Finding Petition Denial

Thanks! Taking a look now.

Ex. 5 Deliberative Process (DP)

David Fotouhi

Acting General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

From: Gustafson, Adam <Gustafson.Adam@epa.gov>
Sent: Monday, January 18, 2021 6:44 AM
To: Fotouhi, David <Fotouhi.David@epa.gov>
Subject: Draft Endangerment Finding Petition Denial

DELIBERATIVE

David,

This draft responds to **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

Adam Gustafson

Deputy General Counsel

Office of General Counsel

U.S. Environmental Protection Agency

Office: 202-564-7263

Cell: 202-836-3570

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/19/2021 5:19:22 AM
To: Fotouhi, David [fotouhi.david@epa.gov]
Subject: RE: GHG NAAQS petition
Attachments: 20210118 GHG NAAQS Denial w cover letter.docx

Here it is. I will send one more email tonight containing this and two other documents for the Administrator's signature.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Fotouhi, David <Fotouhi.David@epa.gov>
Sent: Monday, January 18, 2021 11:30 PM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Subject: Re: GHG NAAQS petition

Thanks! Good suggestion...let's do one consolidated word document.

Sent from my iPhone

On Jan 18, 2021, at 11:17 PM, Gustafson, Adam <Gustafson.Adam@epa.gov> wrote:

Ex. 5 AC/DP

I'll clean this up and convert to pdf and send it with the cover letter as a word doc-- unless I should make it all one word document **Ex. 5 Deliberative Process (DP)** as I did with the Endangerment Finding denial.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Fotouhi, David <Fotouhi.David@epa.gov>
Sent: Monday, January 18, 2021 5:31 PM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Subject: GHG NAAQS petition

Went through this draft one last time

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

David Fotouhi

Acting General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

<20210115b Draft GHG NAAQS Petition Denial +df +ag.docx>

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/19/2021 4:17:28 AM
To: Fotouhi, David [fotouhi.david@epa.gov]
Subject: RE: GHG NAAQS petition
Attachments: 20210115b Draft GHG NAAQS Petition Denial +df +ag.docx

Ex. 5 AC/DP

I'll clean this up and convert to pdf and send it with the cover letter as a word doc-- unless I should make it all one word document: **Ex. 5 Deliberative Process (DP)** as I did with the Endangerment Finding denial.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Fotouhi, David <Fotouhi.David@epa.gov>
Sent: Monday, January 18, 2021 5:31 PM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Subject: GHG NAAQS petition

Went through this draft: **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

David Fotouhi

Acting General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/19/2021 5:02:47 PM
To: Raymond, Kelley [Raymond.Kelley@epa.gov]
Subject: RE: GHG petition denials for posting and emailing

Yes.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Raymond, Kelley <Raymond.Kelley@epa.gov>
Sent: Tuesday, January 19, 2021 12:02 PM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Subject: Re: GHG petition denials for posting and emailing

I'm sure that I can - can I call you around 2 to ask a couple quick questions before sending?

Sent from my iPhone

On Jan 19, 2021, at 11:41 AM, Gustafson, Adam <Gustafson.Adam@epa.gov> wrote:

Kelley,

Here are the two signed documents we have discussed for posting on OAR's website:

- Denial of three petitions to regulate GHG as a NAAQS, as a cross-border pollutant under CAA 115, and as a HAP, submitted by CBD, NYU Law Institute for Policy Integrity, and Food & Water Watch, respectively;
- Denial of four petitions to reconsider the 2009 GHG Endangerment Finding, submitted by CHECC, CEI/SEPP, Liberty Packing/TPPF, and FAIR Energy Foundation.

Are you able to send these to the petitioners' email addresses on the cover letters with a short note directing them to Tsirigotis or Grundler as appropriate? We would prefer for this to come from OAR if possible.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Scott, Corey <scott.corey@epa.gov>
Sent: Tuesday, January 19, 2021 11:21 AM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Cc: Fotouhi, David <Fotouhi.David@epa.gov>; adm15.arwheeler.email@epa.gov>
Subject: NAAQS Denial Signed

Adam,

Here is the NAAQS denial! Thanks!

Corey
<GHG NAAQS Petition Denial 2021-01-19.pdf>
<GHG Endangerment Petition Denial 2021-01-19.pdf>

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/19/2021 7:56:42 PM
To: Raymond, Kelley [Raymond.Kelley@epa.gov]
Subject: RE: GHG petition denials for posting and emailing

Many thanks, Kelley.

If you get an update from Juan Santiago about **Ex. 5 Deliberative Process (DP)** that would be good to hear.

Adam Gustafson
Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Raymond, Kelley <Raymond.Kelley@epa.gov>
Sent: Tuesday, January 19, 2021 2:53 PM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Subject: RE: GHG petition denials for posting and emailing

Responses have been emailed, and the request has been put in for the website updates.

Kelley Raymond
Office of Air and Radiation
U.S. Environmental Protection Agency

From: Gustafson, Adam <Gustafson.Adam@epa.gov>
Sent: Tuesday, January 19, 2021 11:41 AM
To: Raymond, Kelley <Raymond.Kelley@epa.gov>
Subject: GHG petition denials for posting and emailing

Kelley,

Here are the two signed documents we have discussed for posting on OAR's website:

- Denial of three petitions to regulate GHG as a NAAQS, as a cross-border pollutant under CAA 115, and as a HAP, submitted by CBD, NYU Law Institute for Policy Integrity, and Food & Water Watch, respectively;
- Denial of four petitions to reconsider the 2009 GHG Endangerment Finding, submitted by CHECC, CEI/SEPP, Liberty Packing/TPPF, and FAIR Energy Foundation.

Are you able to send these to the petitioners' email addresses on the cover letters with a short note directing them to Tsirigotis or Grundler as appropriate? We would prefer for this to come from OAR if possible.

Adam Gustafson
Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency

Office: 202-564-7263
Cell: 202-836-3570

From: Scott, Corey <scott.corey@epa.gov>
Sent: Tuesday, January 19, 2021 11:21 AM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Cc: Fotouhi, David <Fotouhi.David@epa.gov>; adm15.arwheeler.email <adm15.arwheeler.email@epa.gov>
Subject: NAAQS Denial Signed

Adam,

Here is the NAAQS denial! Thanks!

Corey

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/19/2021 6:22:47 AM
To: David Fotouhi (fotouhi.david@epa.gov) [fotouhi.david@epa.gov]
Subject: Documents for AW Signature
Attachments: 20210118 GHG NAAQS Denial w cover letter.docx; 20210118d GHG Endangerment Denial w cover letter.docx; Chevron Applicability Determination 1-18-21.docx

David,

Here are two documents (plus a possible third) for the Administrator's signature:

- **Ex. 5 Deliberative Process (DP)**
- **Ex. 5 Deliberative Process (DP)**

The possible third document for the Administrator's signature is:

- Chevron applicability determination **Ex. 5 Deliberative Process (DP)**
Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Adam Gustafson
Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/20/2021 1:46:32 PM
To: Raymond, Kelley [Raymond.Kelley@epa.gov]
Subject: RE: GHG petition denials for posting and emailing

Any word on whether these have gone up on the website? I'm not sure where to look.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Raymond, Kelley <Raymond.Kelley@epa.gov>
Sent: Tuesday, January 19, 2021 2:53 PM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Subject: RE: GHG petition denials for posting and emailing

Responses have been emailed, and the request has been put in for the website updates.

Kelley Raymond
Office of Air and Radiation
U.S. Environmental Protection Agency

From: Gustafson, Adam <Gustafson.Adam@epa.gov>
Sent: Tuesday, January 19, 2021 11:41 AM
To: Raymond, Kelley <Raymond.Kelley@epa.gov>
Subject: GHG petition denials for posting and emailing

Kelley,

Here are the two signed documents we have discussed for posting on OAR's website:

- Denial of three petitions to regulate GHG as a NAAQS, as a cross-border pollutant under CAA 115, and as a HAP, submitted by CBD, NYU Law Institute for Policy Integrity, and Food & Water Watch, respectively;
- Denial of four petitions to reconsider the 2009 GHG Endangerment Finding, submitted by CHECC, CEI/SEPP, Liberty Packing/TPPF, and FAIR Energy Foundation.

Are you able to send these to the petitioners' email addresses on the cover letters with a short note directing them to Tsirigotis or Grundler as appropriate? We would prefer for this to come from OAR if possible.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Scott, Corey <scott.corey@epa.gov>
Sent: Tuesday, January 19, 2021 11:21 AM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Cc: Fotouhi, David <Fotouhi.David@epa.gov>; adm15.arwheeler.email <adm15.arwheeler.email@epa.gov>
Subject: NAAQS Denial Signed

Adam,

Here is the NAAQS denial! Thanks!

Corey

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/13/2021 2:19:16 AM
To: Williams, Melina [Williams.Melina@epa.gov]; Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]
Subject: Endangerment Finding Petitions
Attachments: ef-epa-petitionforreconsiderationof-ef-final-1.pdf; Liberty-v.-EPA-Petition.pdf

Melina,

I understand you have communicated with David about these GHG endangerment finding petitions. Are you available between 9:30am and 11am tomorrow to discuss

Ex. 5 Deliberative Process (DP)

Adam Gustafson
Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Fotouhi, David <Fotouhi.David@epa.gov>
Sent: Monday, January 4, 2021 11:02 AM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Subject: Petitions

David Fotouhi
Acting General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/19/2021 8:01:38 PM
To: David Fotouhi (fotouhi.david@epa.gov) [fotouhi.david@epa.gov]
Subject: FW: GHG petition denials for posting and emailing

FYI

From: Raymond, Kelley <Raymond.Kelley@epa.gov>
Sent: Tuesday, January 19, 2021 2:53 PM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Subject: RE: GHG petition denials for posting and emailing

Responses have been emailed, and the request has been put in for the website updates.

Kelley Raymond
Office of Air and Radiation
U.S. Environmental Protection Agency

From: Gustafson, Adam <Gustafson.Adam@epa.gov>
Sent: Tuesday, January 19, 2021 11:41 AM
To: Raymond, Kelley <Raymond.Kelley@epa.gov>
Subject: GHG petition denials for posting and emailing

Kelley,

Here are the two signed documents we have discussed for posting on OAR's website:

- Denial of three petitions to regulate GHG as a NAAQS, as a cross-border pollutant under CAA 115, and as a HAP, submitted by CBD, NYU Law Institute for Policy Integrity, and Food & Water Watch, respectively;
- Denial of four petitions to reconsider the 2009 GHG Endangerment Finding, submitted by CHECC, CEI/SEPP, Liberty Packing/TPPF, and FAIR Energy Foundation.

Are you able to send these to the petitioners' email addresses on the cover letters with a short note directing them to Tsigotis or Grundler as appropriate? We would prefer for this to come from OAR if possible.

Adam Gustafson
Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Scott, Corey <scott.corey@epa.gov>
Sent: Tuesday, January 19, 2021 11:21 AM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Cc: Fotouhi, David <Fotouhi.David@epa.gov>; adm15.arwheeler.email <adm15.arwheeler.email@epa.gov>
Subject: NAAQS Denial Signed

Adam,

Here is the NAAQS denial! Thanks!

Corey

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/20/2021 4:46:40 PM
To: Grantham, Nancy [Grantham.Nancy@epa.gov]
CC: Payne, James (Jim) [payne.james@epa.gov]
Subject: RE: Petition denials for posting online

I don't see a convenient place for the other document, and it is less important than the NAAQS denial.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Gustafson, Adam
Sent: Wednesday, January 20, 2021 11:45 AM
To: Grantham, Nancy <Grantham.Nancy@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>
Subject: RE: Petition denials for posting online

Nancy,

Here is where the attached NAAQS attachment should be posted **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

The February 25, 2013 entry on this page should be edited to **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Gustafson, Adam
Sent: Wednesday, January 20, 2021 11:38 AM
To: Grantham, Nancy <Grantham.Nancy@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>
Subject: FW: Petition denials for posting online

Nancy,

Here are the documents for posting. I will follow up with the location.

Thanks.

Adam

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Gustafson, Adam

Sent: Wednesday, January 20, 2021 11:08 AM

To: Griffin, Chris <Griffin.Chris@epa.gov>

Cc: Payne, James (Jim) <payne.james@epa.gov>; Packard, Elise <Packard.Elise@epa.gov>

Subject: Petition denials for posting online

Chris,

David asked that these two Administrator-signed petition denials be posted on OGC's website. I believe he gave you a heads-up this might be coming. Could you please confirm that you are able to do this now?

Thank you.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Gustafson, Adam

Sent: Tuesday, January 19, 2021 11:41 AM

To: Raymond, Kelley <Raymond.Kelley@epa.gov>

Subject: GHG petition denials for posting and emailing

Kelley,

Here are the two signed documents we have discussed for posting on OAR's website:

- Denial of three petitions to regulate GHG as a NAAQS, as a cross-border pollutant under CAA 115, and as a HAP, submitted by CBD, NYU Law Institute for Policy Integrity, and Food & Water Watch, respectively;
- Denial of four petitions to reconsider the 2009 GHG Endangerment Finding, submitted by CHECC, CEI/SEPP, Liberty Packing/TPPF, and FAIR Energy Foundation.

Are you able to send these to the petitioners' email addresses on the cover letters with a short note directing them to Tsigotis or Grundler as appropriate? We would prefer for this to come from OAR if possible.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263

Cell: 202-836-3570

From: Scott, Corey <scott.corey@epa.gov>

Sent: Tuesday, January 19, 2021 11:21 AM

To: Gustafson, Adam <Gustafson.Adam@epa.gov>

Cc: Fotouhi, David <Fotouhi.David@epa.gov>; adm15.arwheeler.email <adm15.arwheeler.email@epa.gov>

Subject: NAAQS Denial Signed

Adam,

Here is the NAAQS denial! Thanks!

Corey



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

June 17, 2020

MEMORANDUM

SUBJECT: Impartiality Determination to Participate in Certain Matters Involving the Competitive Enterprise Institute

FROM: James Payne
Designated Agency Ethics Official and
Deputy General Counsel for Environmental Media and Regional Law Offices

TO: Adam Gustafson
Deputy General Counsel

Prior to entering federal service on March 29, 2020, you were a partner at Boyden Gray & Associates, providing legal and lobbying services to a variety of clients. Now, as Deputy General Counsel of the United States Environmental Protection Agency (EPA), you seek to participate in specific party matters in which one of your former clients, the Competitive Enterprise Institute (CEI), is a party, provided that you did not yourself work personally and substantially on that same matter. You have received a waiver from the White House Counsel's office and now seek an impartiality determination from me. Your request is granted.

BACKGROUND

The previous Administration issued the Clean Power Plan (CPP) on October 23, 2015, and it was quickly challenged by numerous entities. *See State of West Virginia v. EPA*, No. 15-1363 (D.C. Cir.). The 2015 CPP was then stayed by the U.S. Supreme Court, keeping it from going into effect. On October 10, 2017, following a review as directed by President Trump's Energy Independence Executive Order, EPA proposed to repeal the 2015 CPP.

After determining that the 2015 CPP exceeded EPA's statutory authority under the Clean Air Act, the EPA proposed the Affordable Clean Energy (ACE) Rule on August 21, 2018, to reduce greenhouse gas emission from existing coal-fired electric utility generating units and power plants. This new rule, finalized on June 19, 2019, replaces the 2015 CPP and establishes emission guidelines for states to develop plans to address greenhouse gas emissions from existing coal-fired power plants. The ACE Rule was also challenged, including *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.). You, however, did not participate in this litigation on behalf of CEI or any other client.

NEED FOR A PLEDGE WAIVER

Pursuant to Executive Order 13770, you signed the Ethics Pledge and are prohibited from participating in specific party matters in which your former employer or former client is a party or represents a party. Given the Agency's interest in having your participation in the ACE litigation, the EPA sought a waiver of the provisions of Section 1, paragraph 6 of the Ethics Pledge on your behalf. This waiver, which was granted on June 17, 2020, authorizes you to participate personally and substantially in the *American Lung Association* litigation and any other potential cases arising at EPA in which your former client, CEI, is a party, provided that you did not previously participate personally and substantially in that same matter for CEI or any other party. See attachment.

NEED FOR IMPARTIALITY DETERMINATION

What remains is an impartiality concern under the federal ethics rules set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, Subpart E, "Impartiality in Performing Official Duty." For one year from the date you last provided services to CEI, you have a "covered relationship" with them pursuant to 5 C.F.R. § 2635.502(b)(1)(iv). Absent an impartiality determination from me, you still cannot participate in any specific party matter in which CEI is a party if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. See 5 C.F.R. § 2635.502(a).

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern over the questioning of the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). The factors that EPA takes into consideration are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Because I conclude that the interest of the United States Government in your participation outweighs any concerns about your impartiality, I am authorizing you to participate as Deputy General Counsel in specific party matters in which CEI is a party, provided that you did not participate personally and substantially in the matter previously with CEI or any other party. In making this determination to enable you to effectively carry out your duties as Deputy General Counsel and to advance the interests of the Agency, I have taken the following factors into consideration:

Nature of the relationship involved – A graduate of the University of Virginia and Yale Law School, you clerked for judges on the Ninth Circuit and the D.C. Circuit before entering private practice. Prior to becoming a partner at Boyden Gray & Associates, you were an associate at Cooper & Kirk where you specialized in appellate litigation. While at Boyden Gray & Associates, you represented States, environmental groups, biofuel producers, agricultural interests, and public policy organizations, on air quality and automotive regulations and other Clean Air Act (CAA) matters. You have argued CAA appeals in the U.S. Court of Appeals for the D.C. Circuit and testified before Congress on CAA regulations. Through this work, you have gained extensive experience in CAA regulations and litigation.

During the year prior to your federal appointment, you provided legal services to CEI and represented this entity in the litigation related to EPA's 2015 CPP. Those proceedings were dismissed shortly after EPA finalized the ACE Rule in 2019. Of importance is that your Clean Air Act-related representation of CEI was limited to the CPP litigation (*West Virginia v. EPA*), and neither you nor your former firm provided legal services to CEI regarding the ACE Rule or related litigation (*American Lung Association v. EPA*).

Effect of the matter upon your financial interest – You have no continuing financial interest with CEI, nor do you have any financial interest in the outcome of this case.

Nature and importance of the employee's role – In addition to serving as the chief legal advisor to EPA and implementing the nation's environmental laws, the Office of General Counsel also represents the Agency in court challenges to agency actions. In the position of Deputy General Counsel, you must be able to provide legal counsel and vital input into the Agency's defense of such challenges, including the ACE Rule litigation. Your invaluable knowledge and experience with Clean Air Act regulations and litigation are of great importance in advocating the interests of the Agency in defending the ACE Rule and advising the Administrator and senior leadership, especially given the recent departure of OGC's previous political appointee in the role of Deputy General Counsel specializing in the CAA.

Sensitivity of the matter – The ACE Rule empowers states to continue to reduce emissions while providing affordable and reliable energy for all Americans. Your participation in this important specific party matter, including decisions the Agency makes to defend the ACE Rule, will be of importance to the Administrator and senior leadership. The case involves nationally significant air issues and Administration interests.

Difficulty of reassigning the matter to another employee – Your expertise and comprehensive understanding of CAA regulations and litigation are crucial for EPA, including for this case. The previous political Deputy General Counsel with CAA expertise started in January 2017 and departed in December 2019. You were hired because of your extensive CAA expertise which is needed to counsel and advise the EPA Administrator and senior leadership on behalf of the Agency, including for this case which is particularly important to the priorities of the Administration.

Under this limited authorization, you may participate personally and substantially in *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.). There could potentially be other

specific party matters involving CEI in which your expertise is needed for similar reasons as described above. Thus, this authorization permits you to participate in other specific party matters in which CEI is a party provided that you did not previously participate personally and substantially while serving as an attorney for CEI or any other party. You will be allowed to participate in these specific party matters, including meetings or communications related to such cases even if CEI is present. But you must remain recused from those specific party matters in which your former client is a party if you participated personally and substantially previously. You will otherwise fully comply with the remainder of the requirements imposed by the President's Ethics Pledge and with all applicable federal ethics laws and regulations, as well as your own attorney bar obligations.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact Shannon Griffo or Justina Fugh of OGC/Ethics or me.

Attachment

cc: Matthew Z. Leopold, General Counsel
David Fotouhi, Principal Deputy General Counsel
Elise Packard, Deputy General Counsel for Operations
Kamila Lis-Coghlan, Deputy General Counsel
Ariadne Goerke, Acting Associate Deputy General Counsel
Justina Fugh, Director, Ethics Office

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/13/2021 3:39:29 AM
To: Griffo, Shannon [Griffo.Shannon@epa.gov]
CC: Payne, James (Jim) [payne.james@epa.gov]; Fugh, Justina [Fugh.Justina@epa.gov]
Subject: RE: Updated Recusal Statement for your review
Attachments: 2020.6.17 Gustafson Waiver Signed.pdf; Gustafson Impartiality Waiver.pdf

Shannon,

Under the ethics waiver I received, I'm allowed to participated in "any other potential cases arising at EPA where [my former client] CEI is a party and [I] did not previously participate personally and substantially while serving as an attorney for CEI or any other party."

In this context, does "case" include an administrative petition for reconsideration? CEI petitioned EPA to reconsider a regulatory action, and I have been asked whether I can work on the Agency's response.

Here is what my updated recusal statement says:

On June 17, 2020, the White House granted me a limited waiver of the provisions of Section 1, Paragraph 6, for one of my former clients, the Competitive Enterprise Institute (CEI). This waiver permits me to participate in specific party matters in which CEI is a party, provided that I was not previously involved in that matter. To address my "covered relationship" with CEI under the federal impartiality standards, EPA's Designated Agency Ethics Official issued me an impartiality determination on that same day. See attachments. I am now authorized to participate personally and substantially in *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.) and any other potential cases arising at EPA in which my former client, CEI, is a party, provided that I did not previously participate personally and substantially in that same matter for CEI or any other party. I may participate personally and substantially, including meetings or communications related to such cases even if CEI is present. But I understand that I must remain recused from any specific party matters in which my former client is a party if I participated personally and substantially previously.

I will send a separate request to schedule a one-on-one as you suggest. Maybe we can kill two birds with one stone.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Griffo, Shannon <Griffo.Shannon@epa.gov>
Sent: Friday, June 19, 2020 1:28 PM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Cc: Payne, James <payne.james@epa.gov>; Fugh, Justina <Fugh.Justina@epa.gov>
Subject: Updated Recusal Statement for your review

Hi Adam,

We've updated your recusal statement to reflect the issuance of your pledge waiver and impartiality determination, which would also be included as attachments to your revised recusal. Please take a look and let us know if you have any questions or comments.

Thanks,
Shannon

Shannon Griffo
Ethics Attorney
Office of General Counsel, Ethics
U.S. Environmental Protection Agency
(202) 564-7061
Griffo.Shannon@epa.gov

MEMORANDUM

TO: JAMES PAYNE
DEPUTY GENERAL COUNSEL FOR ENVIRONMENTAL MEDIA AND
REGIONAL LAW OFFICES, AND
DESIGNATED AGENCY ETHICS OFFICIAL
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

FROM: SCOTT F. GAST
DEPUTY COUNSEL AND DEPUTY ASSISTANT TO THE PRESIDENT
THE WHITE HOUSE

DATE: June 17, 2020

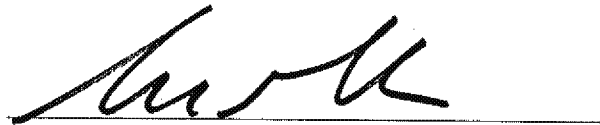
SUBJECT: Limited Waiver of Section 1, Paragraph 6 of Executive Order 13770

Official: Adam Gustafson
Deputy General Counsel
United States Environmental Protection Agency

After reviewing your limited waiver request memorandum, I hereby provide a limited waiver of the requirements of Section 1, paragraph 6 of Executive Order 13770 to Mr. Adam Gustafson to allow him to participate in specific party matters, including *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.), despite the involvement of his former client, the Competitive Enterprise Institute (CEI). I have determined that it is in the public interest to grant this limited waiver because of Mr. Gustafson's extensive experience in Clean Air Act regulation and litigation, the fact that he did not previously participate in the *American Lung Association* litigation, and the importance of his involvement in this specific party matter to assist with the Administration's defense of the Affordable Clean Energy (ACE) Rule.

In light of the importance of the aforementioned efforts to the Trump Administration and to the United States Environmental Protection Agency, a limited waiver of the provisions of paragraph 6 of the Ethics Pledge (contained in Section 1 of Executive Order 13770) is justified for Mr. Gustafson so that he can effectively carry out his duties as Deputy General Counsel and ably advise the EPA Administrator and senior leadership. Accordingly, I authorize Adam Gustafson to be able to participate personally and substantially in *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.), and any other potential cases arising at EPA where CEI is a party and Mr. Gustafson did not previously participate personally and substantially while serving as an attorney for CEI or any other party. He will be allowed to participate in those specific party matters, including meetings or communications related to such cases where CEI is present. However, he will remain recused from those specific party matters in which his former client is a party if he had himself participated personally and substantially previously.

This limited waiver does not affect the application of any other provision of law, including any other provision of the Ethics Pledge; the Standards of Ethical conduct for Employees of the Executive Branch (5 C.F.R. Part 2635); or the criminal bribery, graft and conflict of interest statutes (18 U.S.C. §§ 201-209; or the Hatch Act (5 U.S.C. § 7323).



Scott F. Gast

Deputy Counsel and Deputy Assistant to the President

Dated: 6/17/2020

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/20/2021 4:12:47 PM
To: Lee, Terry [lee.terry@epa.gov]
CC: Griffin, Chris [Griffin.Chris@epa.gov]; Payne, James (Jim) [payne.james@epa.gov]; Packard, Elise [Packard.Elise@epa.gov]
Subject: FW: Petition denials for posting online
Attachments: GHG NAAQS Petition Denial 2021-01-19.pdf; GHG Endangerment Petition Denial 2021-01-19.pdf

Terry,

I got an away message from Chris. Would you please post documents on the OGC website now?

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Gustafson, Adam
Sent: Wednesday, January 20, 2021 11:08 AM
To: Griffin, Chris <Griffin.Chris@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>; Packard, Elise <Packard.Elise@epa.gov>
Subject: Petition denials for posting online

Chris,

David asked that these two Administrator-signed petition denials be posted on OGC's website. I believe he gave you a heads-up this might be coming. Could you please confirm that you are able to do this now?

Thank you.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Gustafson, Adam
Sent: Tuesday, January 19, 2021 11:41 AM
To: Raymond, Kelley <Raymond.Kelley@epa.gov>
Subject: GHG petition denials for posting and emailing

Kelley,

Here are the two signed documents we have discussed for posting on OAR's website:

- Denial of three petitions to regulate GHG as a NAAQS, as a cross-border pollutant under CAA 115, and as a HAP, submitted by CBD, NYU Law Institute for Policy Integrity, and Food & Water Watch, respectively;
- Denial of four petitions to reconsider the 2009 GHG Endangerment Finding, submitted by CHECC, CEI/SEPP, Liberty Packing/TPPF, and FAIR Energy Foundation.

Are you able to send these to the petitioners' email addresses on the cover letters with a short note directing them to Tsirigotis or Grundler as appropriate? We would prefer for this to come from OAR if possible.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Scott, Corey <scott.corey@epa.gov>

Sent: Tuesday, January 19, 2021 11:21 AM

To: Gustafson, Adam <Gustafson.Adam@epa.gov>

Cc: Fotouhi, David <Fotouhi.David@epa.gov>; adm15.arwheeler.email <adm15.arwheeler.email@epa.gov>

Subject: NAAQS Denial Signed

Adam,

Here is the NAAQS denial! Thanks!

Corey



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE ADMINISTRATOR

January 19, 2021

Sam Kazman, General Counsel
Competitive Enterprise Institute
1310 L Street, NW, 7th Floor
Washington, D.C. 20005
(202) 331-1010
samkazan@cei.org

Francis Menton
Law Office of Francis Menton
85 Broad Street, 18th floor
New York, New York 10004
(212) 627-1796
fmenton@manhattancontrarian.com

Theodore Hadzi-Antich
Texas Public Policy Foundation
901 Congress Avenue
Austin, Texas 78701
tha@texaspolicy.com

Harry W. MacDougald
Caldwell Propst & DeLoach LLP
Two Ravinia Drive, Suite 1600
Atlanta, Georgia 30346
(404) 843-1956
hmacdougald@cpdlawyers.com

Dave Wallace, President
FAIR Energy Foundation
805 15th St. NW, Suite 100
Washington, DC 20005
Dave.wallace@fairenergyfoundation.org

*Attorneys for Concerned Household
Electricity Consumers Council and
its members*

Dear Messrs. Kazman, Hadzi-Antich, Wallace, Menton, and MacDougald:

I am responding to your petitions to the U.S. Environmental Protection Agency to reconsider our 2009 Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act.

The EPA has reviewed your petitions and the information available on the issues you raised. For the reasons discussed in the enclosed response, the EPA denies your petitions.

I would like to thank you for your interest in these issues. The EPA looks forward to working with you and other stakeholders as we continue to protect human health and the environment in accordance with law.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew R. Wheeler".

Andrew R. Wheeler

Enclosure

Denial of Petitions to Reconsider the EPA's Greenhouse Gas Endangerment Finding

This document is in response to four petitions requesting that the EPA reconsider its 2009 Endangerment Finding for Greenhouse Gas (GHG). The petitions were submitted by the Concerned Household Electricity Consumers Council (CHECC) on January 20, 2017, the Competitive Enterprise Institute and the Science and Environmental Policy Project (CEI & SEPP) on February 23, 2017,¹ Liberty Packing Company LLC and several other entities represented by the Texas Public Policy Foundation on May 1, 2017, and the FAIR Energy Foundation (received by the Agency in 2019).

As you know, we issued our Endangerment Finding in 2009 in response to the U.S. Supreme Court's holding in *Massachusetts v. EPA*, that under section 202(a)(1) of the Clean Air Act, the EPA must either decide whether greenhouse gases cause or contribute to climate change or provide a reasoned justification for declining to form a scientific judgment. 549 U.S. 497, 533–35 (2007).

Our Endangerment Finding concluded on the basis of scientific evidence from the U.S. Global Climate Research Program, the Intergovernmental Panel on Climate Change, and the National Research Council that certain long-lived and directly emitted greenhouse gases in the atmosphere—the six well-mixed greenhouse gases—may reasonably be anticipated both to endanger public health and to endanger public welfare.

The Endangerment Finding was the subject of ten separate petitions for reconsideration that the EPA denied in 2010. We incorporate by reference our Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, *available at* <https://www.epa.gov/ghgemissions/epas-response-petitions-reconsider-endangerment-and-cause-or-contribute-findings>.

The petitioners brought a judicial challenge following EPA's denial of their reconsideration petitions, and the D.C. Circuit upheld the 2009 Endangerment Finding in 2012. *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 120-26 (D.C. Cir. 2012).

In the intervening years, we have issued several new rules that rely on the Endangerment Finding as a predicate. These include the *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2*, 81 Fed. Reg. 73,478, 73,486 (Oct. 25, 2016); the Affordable Clean Energy Rule, *Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units*, 84 Fed. Reg. 32,520 (July 8, 2019); and *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks*, 85 Fed. Reg. 24,174 (Apr. 30, 2020). In 2016, EPA issued an endangerment finding as the predicate for the airplane greenhouse gas standards. *See Control of Air Pollution From Airplanes and Airplane Engines: GHG Emission Standards and Test*

¹ The Competitive Enterprise Institute and the Science and Environmental Policy Project characterize theirs as a petition “to initiate a rulemaking proceeding on the subject of greenhouse gases and their impact on public health and welfare” or, in the alternative, “as a petition for reconsideration of its Endangerment Finding.” CEI & SEPP Petition at 1.

Procedures, 86 Fed. Reg. 2136, 2143 (Jan. 11, 2021). (The 2016 airplane endangerment finding was based on “[t]he Administrator’s view is that the body of scientific evidence amassed in the record for the 2009 Endangerment Finding also compellingly supports an endangerment finding under CAA section 231(a)(2)(A).” 81 Fed. Reg. at 54,424.)

To the extent we have considered new assessments of the danger posted by greenhouse gases, we have concluded that they “further strengthen[] the case that GHG emissions endanger public health and welfare.” *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2*, 81 Fed. Reg. 73,478, 73,486 (Oct. 25, 2016). We incorporate this discussion by reference.

And we have sometimes responded to comments that question the scientific basis for our Endangerment Finding. *See, e.g., Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles - Phase 2*, EPA-420-R-16-901, at 1435-36 (Aug. 2016). We incorporate those responses here by reference.

The three petitions from CHECC, CEI & SEPP, and the FAIR Energy Foundation each challenge the 2009 Endangerment Finding’s reliance on three lines of evidence that the petitioners allege have been called into question by new scientific research.

Liberty Packing Company and its co-petitioners challenge the EPA’s 2009 Endangerment Finding for not having gone through peer review with Science Advisory Board, for relying on information from international organizations, and for causing adverse economic impacts.

Upon consideration of the four petitions, the EPA concludes that they present insufficient information to warrant revisiting the 2009 Endangerment Finding. EPA therefore denies the petitions.

Message

From: Gustafson, Adam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=20857A3831394ED6B0348DC4ADBCE080-GUSTAFSON,]
Sent: 1/20/2021 4:15:34 PM
To: Lattimore, Kraig [lattimore.kraig@epa.gov]
CC: Griffin, Chris [Griffin.Chris@epa.gov]; Lee, Terry [lee.terry@epa.gov]; Payne, James (Jim) [payne.james@epa.gov]; Packard, Elise [Packard.Elise@epa.gov]
Subject: Petition denials for posting online
Attachments: GHG NAAQS Petition Denial 2021-01-19.pdf; GHG Endangerment Petition Denial 2021-01-19.pdf

Kraig,

I got an away message from Chris and Terry. Would you please post these documents on the OGC website now?

Thank you.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Gustafson, Adam
Sent: Wednesday, January 20, 2021 11:08 AM
To: Griffin, Chris <Griffin.Chris@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>; Packard, Elise <Packard.Elise@epa.gov>
Subject: Petition denials for posting online

Chris,

David asked that these two Administrator-signed petition denials be posted on OGC's website. I believe he gave you a heads-up this might be coming. Could you please confirm that you are able to do this now?

Thank you.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Gustafson, Adam
Sent: Tuesday, January 19, 2021 11:41 AM
To: Raymond, Kelley <Raymond.Kelley@epa.gov>
Subject: GHG petition denials for posting and emailing

Kelley,

Here are the two signed documents we have discussed for posting on OAR's website:

- Denial of three petitions to regulate GHG as a NAAQS, as a cross-border pollutant under CAA 115, and as a HAP, submitted by CBD, NYU Law Institute for Policy Integrity, and Food & Water Watch, respectively;
- Denial of four petitions to reconsider the 2009 GHG Endangerment Finding, submitted by CHECC, CEI/SEPP, Liberty Packing/TPPF, and FAIR Energy Foundation.

Are you able to send these to the petitioners' email addresses on the cover letters with a short note directing them to Tsirigotis or Grundler as appropriate? We would prefer for this to come from OAR if possible.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Scott, Corey <scott.corey@epa.gov>

Sent: Tuesday, January 19, 2021 11:21 AM

To: Gustafson, Adam <Gustafson.Adam@epa.gov>

Cc: Fotouhi, David <Fotouhi.David@epa.gov>; adm15.arwheeler.email <adm15.arwheeler.email@epa.gov>

Subject: NAAQS Denial Signed

Adam,

Here is the NAAQS denial! Thanks!

Corey

Message

From: Fotouhi, David [Fotouhi.David@epa.gov]
Sent: 1/19/2021 1:27:11 PM
To: Gustafson, Adam [Gustafson.Adam@epa.gov]
Subject: RE: Documents for AW Signature

Thanks! I'll give the petition denials a quick once-over

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

David Fotouhi

Acting General Counsel
U.S. Environmental Protection Agency
Tel: +1 202.564.1976
fotouhi.david@epa.gov

From: Gustafson, Adam <Gustafson.Adam@epa.gov>
Sent: Tuesday, January 19, 2021 1:23 AM
To: Fotouhi, David <Fotouhi.David@epa.gov>
Subject: Documents for AW Signature

David,

Here are two documents (plus a possible third) for the Administrator's signature:

- **Ex. 5 Deliberative Process (DP)**
- **Ex. 5 Deliberative Process (DP)**

The possible third document for the Administrator's signature is:

- Chevron applicability determination confirming **Ex. 5 Deliberative Process (DP)**
Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

Message

From: Fugh, Justina [Fugh.Justina@epa.gov]
Sent: 1/13/2021 6:43:45 AM
To: Payne, James (Jim) [payne.james@epa.gov]
CC: Griffo, Shannon [Griffo.Shannon@epa.gov]; Gustafson, Adam [Gustafson.Adam@epa.gov]
Subject: for your digital signature
Attachments: 2020.6.17 Gustafson Waiver Signed.pdf; Adam Gustafson impartiality determination 1-13-21 for signature.pdf

Hi Jim,

As I expect that time is of the essence for Adam's participation, here is the impartiality determination for your digital signature.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

From: Gustafson, Adam <Gustafson.Adam@epa.gov>
Sent: Wednesday, January 13, 2021 12:59 AM
To: Fugh, Justina <Fugh.Justina@epa.gov>; Griffo, Shannon <Griffo.Shannon@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>
Subject: RE: Updated Recusal Statement for your review

Thank you, Justina. I would appreciate an impartiality determination. Presumably it can be based on your June 17, 2020 impartiality determination. The matter is a CEI petition for reconsideration of EPA's 2009 Greenhouse Gas Endangerment Finding—likely this one:

<https://cei.org/sites/default/files/CEI%20Petition%20for%20Rulemaking%20on%20Endangerment%202017%20corrected.pdf>

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Fugh, Justina <Fugh.Justina@epa.gov>
Sent: Tuesday, January 12, 2021 11:01 PM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>; Griffo, Shannon <Griffo.Shannon@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>
Subject: RE: Updated Recusal Statement for your review

Hi Adam,

Shannon is out of the office this week so let me address your question. We used the word "case" but within the ethics context, we mean any specific party matter. An administrative petition for reconsideration is indeed a specific party matter. Assuming that you did not participate in the underlying matter prior to joining

EPA, then you still have a covered relationship with CEI under the impartiality standards. In order to participate in this administrative petition for reconsideration, we will have to issue you a written impartiality determination.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

From: Gustafson, Adam <Gustafson.Adam@epa.gov>

Sent: Tuesday, January 12, 2021 10:39 PM

To: Griffo, Shannon <Griffo.Shannon@epa.gov>

Cc: Payne, James (Jim) <payne.james@epa.gov>; Fugh, Justina <Fugh.Justina@epa.gov>

Subject: RE: Updated Recusal Statement for your review

Shannon,

Under the ethics waiver I received, I'm allowed to participated in "any other potential cases arising at EPA where [my former client] CEI is a party and [I] did not previously participate personally and substantially while serving as an attorney for CEI or any other party."

In this context, does "case" include an administrative petition for reconsideration? CEI petitioned EPA to reconsider a regulatory action, and I have been asked whether I can work on the Agency's response.

Here is what my updated recusal statement says:

On June 17, 2020, the White House granted me a limited waiver of the provisions of Section 1, Paragraph 6, for one of my former clients, the Competitive Enterprise Institute (CEI). This waiver permits me to participate in specific party matters in which CEI is a party, provided that I was not previously involved in that matter. To address my "covered relationship" with CEI under the federal impartiality standards, EPA's Designated Agency Ethics Official issued me an impartiality determination on that same day. See attachments. I am now authorized to participate personally and substantially in *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.) and any other potential cases arising at EPA in which my former client, CEI, is a party, provided that I did not previously participate personally and substantially in that same matter for CEI or any other party. I may participate personally and substantially, including meetings or communications related to such cases even if CEI is present. But I understand that I must remain recused from any specific party matters in which my former client is a party if I participated personally and substantially previously.

I will send a separate request to schedule a one-on-one as you suggest. Maybe we can kill two birds with one stone.

Adam Gustafson

Deputy General Counsel

Office of General Counsel

U.S. Environmental Protection Agency

Office: 202-564-7263

Cell: 202-836-3570

From: Griffo, Shannon <Griffo.Shannon@epa.gov>
Sent: Friday, June 19, 2020 1:28 PM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Cc: Payne, James <payne.james@epa.gov>; Fugh, Justina <Fugh.Justina@epa.gov>
Subject: Updated Recusal Statement for your review

Hi Adam,

We've updated your recusal statement to reflect the issuance of your pledge waiver and impartiality determination, which would also be included as attachments to your revised recusal. Please take a look and let us know if you have any questions or comments.

Thanks,
Shannon

Shannon Griffo
Ethics Attorney
Office of General Counsel, Ethics
U.S. Environmental Protection Agency
(202) 564-7061
Griffo.Shannon@epa.gov



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Impartiality Determination to Participate in a Petition for Reconsideration of EPA's 2009 Greenhouse Gas Endangerment Finding

FROM: James Payne
Designated Agency Ethics Official and
Deputy General Counsel for Environmental Media and Regional Law Offices

TO: Adam Gustafson
Deputy General Counsel

Prior to entering federal service on March 29, 2020, you were a partner at Boyden Gray & Associates, providing legal and lobbying services to a variety of clients. Now, as Deputy General Counsel of the United States Environmental Protection Agency (EPA), you seek to participate in a specific party matter in which one of your former clients, the Competitive Enterprise Institute (CEI), is a party. You indicate that you did not yourself work personally and substantially on that same matter. You have received a waiver from the White House Counsel's office and now seek an impartiality determination from me. Your request is granted.

NEED FOR A PLEDGE WAIVER

Pursuant to Executive Order 13770, you signed the Ethics Pledge and are prohibited from participating in specific party matters in which your former employer or former client is a party or represents a party. Given the Agency's interest in having your participation in certain matters, the EPA sought a waiver of the provisions of Section 1, paragraph 6 of the Ethics Pledge on your behalf. This waiver, which was granted on June 17, 2020, authorized you to participate personally and substantially in specific litigation as well as other potential cases arising at EPA in which your former client, CEI, is a party, provided that you did not previously participate personally and substantially in that same matter for CEI or any other party. *See* attachment.

NEED FOR IMPARTIALITY DETERMINATION

What remains is an impartiality concern under the federal ethics rules set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, Subpart E, "Impartiality in Performing Official Duty." For one year from the date your last provided services to CEI, you have a "covered relationship" with them pursuant to 5 C.F.R. § 2635.502(b)(1)(iv). Absent an impartiality determination from me, you still cannot participate in

any specific party matter in which CEI is a party if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. *See* 5 C.F.R. § 2635.502(a).

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern over the questioning of the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). The factors that EPA takes into consideration are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Because I conclude that the interest of the United States Government in your participation outweighs any concerns about your impartiality, I am authorizing you to participate as Deputy General Counsel in specific party matters in which CEI is a party, provided that you did not participate personally and substantially in the matter previously with CEI or any other party. In making this determination to enable you to effectively carry out your duties as Deputy General Counsel and to advance the interests of the Agency, I have taken the following factors into consideration:

Nature of the relationship involved – A graduate of the University of Virginia and Yale Law School, you clerked for judges on the Ninth Circuit and the D.C. Circuit before entering private practice. Prior to becoming a partner at Boyden Gray & Associates, you were an associate at Cooper & Kirk where you specialized in appellate litigation. While at Boyden Gray & Associates, you represented States, environmental groups, biofuel producers, agricultural interests, and public policy organizations, on air quality and automotive regulations and other Clean Air Act (CAA) matters. You have argued CAA appeals in the U.S. Court of Appeals for the D.C. Circuit and testified before Congress on CAA regulations. Through this work, you have gained extensive experience in CAA regulations and litigation.

Effect of the matter upon your financial interest – You have no continuing financial interest with CEI, nor do you have any financial interest in the outcome of this petition for reconsideration.

Nature and importance of the employee's role – In addition to serving as the chief legal advisor to EPA and implementing the nation's environmental laws, the Office of General Counsel also represents the Agency in defense of agency actions. In the position of Deputy General Counsel, you must be able to provide legal counsel and vital input into the Agency's defense. Your invaluable knowledge and experience with Clean Air Act regulations and litigation are of great

importance in advocating the interests of the Agency in its consideration of this petition and in advising the Acting General Counsel and Administrator.

Sensitivity of the matter –Your participation in this specific party matter, including decisions the Agency makes at this point in this Administration, will be of importance to the Administrator and senior leadership. The case involves nationally significant air issues and Administration interests.

Difficulty of reassigning the matter to another employee – Your expertise and comprehensive understanding of CAA regulations and litigation are crucial for EPA, including for this case. The previous political Deputy General Counsel with CAA expertise started in January 2017 and departed in December 2019. You were hired because of your extensive CAA expertise which is needed to counsel and advise the EPA Administrator and senior leadership on behalf of the Agency.

Under this limited authorization, you may participate personally and substantially in the CEI petition for reconsideration of EPA's 2009 Greenhouse Gas Endangerment Finding. I determine that your expertise is needed for similar reasons as described above. Thus, this authorization permits you to participate in other specific party matters in which CEI is a party provided that you did not previously participate personally and substantially while serving as an attorney for CEI or any other party. You will be allowed to participate in these specific party matters, including meetings or communications related to such cases even if CEI is present. But you must remain recused from those specific party matters in which your former client is a party if you participated personally and substantially previously. You will otherwise fully comply with the remainder of the requirements imposed by the President's Ethics Pledge and with all applicable federal ethics laws and regulations, as well as your own attorney bar obligations.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact Justina Fugh of OGC/Ethics or me.

Attachment

cc: David Fotouhi, Acting Principal Deputy General Counsel
Elise Packard, Deputy General Counsel for Operations
Kamila Lis-Coghlán, Deputy General Counsel
Justina Fugh, Director, Ethics Office

Message

From: Payne, James (Jim) [payne.james@epa.gov]
Sent: 1/20/2021 5:06:25 PM
To: Grantham, Nancy [Grantham.Nancy@epa.gov]
CC: Gustafson, Adam [Gustafson.Adam@epa.gov]
Subject: Re: Petition denials for posting online

Thank you. I'm forwarding to Gautam in OGC to follow up here.

Sent from my iPhone

On Jan 20, 2021, at 11:57 AM, Grantham, Nancy <Grantham.Nancy@epa.gov> wrote:

Jim – as discussed, the transition is now official, so we need to revisit this posting with the incoming team thanks ng

Nancy Grantham
Principal Deputy Associate Administrator
Environmental Protection Agency
Office of Public Affairs
202-564-6879 (desk)
202-253-7056 (cell)
grantham.nancy@epa.gov

From: Gustafson, Adam <Gustafson.Adam@epa.gov>
Sent: Wednesday, January 20, 2021 11:53 AM
To: Grantham, Nancy <Grantham.Nancy@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>
Subject: RE: Petition denials for posting online

Instead of **Ex. 5 Deliberative Process (DP)**
Ex. 5 Deliberative Process (DP) as I saw in another example.

In the text above the bullet points, please insert:

Ex. 5 Deliberative Process (DP)

This is the example I'm looking at: <https://www.epa.gov/petitions/petition-partial-supplemental-waiver-2016-cellulosic-biofuel-volumetric-requirements>

Adam Gustafson
Deputy General Counsel
Office of General Counsel

U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Gustafson, Adam
Sent: Wednesday, January 20, 2021 11:45 AM
To: Grantham, Nancy <Grantham.Nancy@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>
Subject: RE: Petition denials for posting online

Nancy,

Here is where the attached NAAQS attachment should be posted Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

The February 25, 2013 entry on this page should be edited: Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Adam Gustafson
Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Gustafson, Adam
Sent: Wednesday, January 20, 2021 11:38 AM
To: Grantham, Nancy <Grantham.Nancy@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>
Subject: FW: Petition denials for posting online

Nancy,

Here are the documents for posting. I will follow up with the location.

Thanks.

Adam

Adam Gustafson
Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Gustafson, Adam
Sent: Wednesday, January 20, 2021 11:08 AM

To: Griffin, Chris <Griffin.Chris@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>; Packard, Elise <Packard.Elise@epa.gov>
Subject: Petition denials for posting online

Chris,

David asked that these two Administrator-signed petition denials be posted on OGC's website. I believe he gave you a heads-up this might be coming. Could you please confirm that you are able to do this now?

Thank you.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Gustafson, Adam
Sent: Tuesday, January 19, 2021 11:41 AM
To: Raymond, Kelley <Raymond.Kelley@epa.gov>
Subject: GHG petition denials for posting and emailing

Kelley,

Here are the two signed documents we have discussed for posting on OAR's website:

- Denial of three petitions to regulate GHG as a NAAQS, as a cross-border pollutant under CAA 115, and as a HAP, submitted by CBD, NYU Law Institute for Policy Integrity, and Food & Water Watch, respectively;
- Denial of four petitions to reconsider the 2009 GHG Endangerment Finding, submitted by CHECC, CEI/SEPP, Liberty Packing/TPPF, and FAIR Energy Foundation.

Are you able to send these to the petitioners' email addresses on the cover letters with a short note directing them to Tsirigotis or Grundler as appropriate? We would prefer for this to come from OAR if possible.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Scott, Corey <scott.corey@epa.gov>
Sent: Tuesday, January 19, 2021 11:21 AM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Cc: Fotouhi, David <Fotouhi.David@epa.gov>; adm15.arwheeler.email <adm15.arwheeler.email@epa.gov>
Subject: NAAQS Denial Signed

Adam,

Here is the NAAQS denial! Thanks!

Corey

Message

From: Grantham, Nancy [Grantham.Nancy@epa.gov]
Sent: 1/20/2021 5:08:15 PM
To: Payne, James (Jim) [payne.james@epa.gov]; Gustafson, Adam [Gustafson.Adam@epa.gov]
CC: Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]
Subject: RE: Petition denials for posting online

Thanks

Nancy Grantham
Principal Deputy Associate Administrator
Environmental Protection Agency
Office of Public Affairs
202-564-6879 (desk)
202-253-7056 (cell)
grantham.nancy@epa.gov

From: Payne, James (Jim) <payne.james@epa.gov>
Sent: Wednesday, January 20, 2021 12:06 PM
To: Grantham, Nancy <Grantham.Nancy@epa.gov>; Gustafson, Adam <Gustafson.Adam@epa.gov>
Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>
Subject: RE: Petition denials for posting online

Thank you. I'm asking Gautam in OGC to follow up on this.

From: Grantham, Nancy <Grantham.Nancy@epa.gov>
Sent: Wednesday, January 20, 2021 11:58 AM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>
Subject: RE: Petition denials for posting online

Jim – as discussed, the transition is now official, so we need to revisit this posting with the incoming team thanks ng

Nancy Grantham
Principal Deputy Associate Administrator
Environmental Protection Agency
Office of Public Affairs
202-564-6879 (desk)
202-253-7056 (cell)
grantham.nancy@epa.gov

From: Gustafson, Adam <Gustafson.Adam@epa.gov>
Sent: Wednesday, January 20, 2021 11:53 AM
To: Grantham, Nancy <Grantham.Nancy@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>
Subject: RE: Petition denials for posting online

Instead of **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

as I saw in another example.

In the text above the bullet points, please insert:

Ex. 5 Deliberative Process (DP)

This is the example I'm looking at: <https://www.epa.gov/petitions/petition-partial-supplemental-waiver-2016-cellulosic-biofuel-volumetric-requirements>

Adam Gustafson

Deputy General Counsel

Office of General Counsel

U.S. Environmental Protection Agency

Office: 202-564-7263

Cell: 202-836-3570

From: Gustafson, Adam

Sent: Wednesday, January 20, 2021 11:45 AM

To: Grantham, Nancy <Grantham.Nancy@epa.gov>

Cc: Payne, James (Jim) <payne.james@epa.gov>

Subject: RE: Petition denials for posting online

Nancy,

Here is where the attached NAAQS attachment should be posted **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

The February 25, 2013 entry on this page should be edited **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

Adam Gustafson

Deputy General Counsel

Office of General Counsel

U.S. Environmental Protection Agency

Office: 202-564-7263

Cell: 202-836-3570

From: Gustafson, Adam

Sent: Wednesday, January 20, 2021 11:38 AM

To: Grantham, Nancy <Grantham.Nancy@epa.gov>

Cc: Payne, James (Jim) <payne.james@epa.gov>

Subject: FW: Petition denials for posting online

Nancy,

Here are the documents for posting. I will follow up with the location.

Thanks.

Adam

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Gustafson, Adam
Sent: Wednesday, January 20, 2021 11:08 AM
To: Griffin, Chris <Griffin.Chris@epa.gov>
Cc: Payne, James (Jim) <payne.james@epa.gov>; Packard, Elise <Packard.Elise@epa.gov>
Subject: Petition denials for posting online

Chris,

David asked that these two Administrator-signed petition denials be posted on OGC's website. I believe he gave you a heads-up this might be coming. Could you please confirm that you are able to do this now?

Thank you.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Office: 202-564-7263
Cell: 202-836-3570

From: Gustafson, Adam
Sent: Tuesday, January 19, 2021 11:41 AM
To: Raymond, Kelley <Raymond.Kelley@epa.gov>
Subject: GHG petition denials for posting and emailing

Kelley,

Here are the two signed documents we have discussed for posting on OAR's website:

- Denial of three petitions to regulate GHG as a NAAQS, as a cross-border pollutant under CAA 115, and as a HAP, submitted by CBD, NYU Law Institute for Policy Integrity, and Food & Water Watch, respectively;
- Denial of four petitions to reconsider the 2009 GHG Endangerment Finding, submitted by CHECC, CEI/SEPP, Liberty Packing/TPPF, and FAIR Energy Foundation.

Are you able to send these to the petitioners' email addresses on the cover letters with a short note directing them to Tsirigotis or Grundler as appropriate? We would prefer for this to come from OAR if possible.

Adam Gustafson

Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency

Office: 202-564-7263
Cell: 202-836-3570

From: Scott, Corey <scott.corey@epa.gov>
Sent: Tuesday, January 19, 2021 11:21 AM
To: Gustafson, Adam <Gustafson.Adam@epa.gov>
Cc: Fotouhi, David <Fotouhi.David@epa.gov>; adm15.arwheeler.email <adm15.arwheeler.email@epa.gov>
Subject: NAAQS Denial Signed

Adam,

Here is the NAAQS denial! Thanks!

Corey